DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-571
Title: Harry F. Connick, District Attorney, et al., Petitioners
v.
John Thompson
Docketed: November 10, 2009
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (07-30443)
Decision Date: August 10, 2009

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 6 2009	Petition for a writ of certiorari filed. (Response due December 10, 2009)
Dec 7 2009	Order extending time to file response to petition to and including January 11, 2010.
Dec 10 2009	Brief amicus curiae of Orleans Parish Assistant District Attorneys filed.
Dec 10 2009	Brief amici curiae of National District Attorneys Association filed.
Jan 11 2010	Brief of respondent John Thompson in opposition filed.
Jan 25 2010	Reply of petitioners Harry F. Connick, District Attorney, et al. filed. (Distributed)
Jan 27 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 3 2010	Record Requested .
Feb 26 2010	Records received from the U.S. Court of Appeals for the Fifth Circuit and the U. S. District Court for the Eastern District of Louisiana (3 boxes).
Mar 3 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 22 2010	Petition GRANTED limited to Question 1 presented by the petition.
Apr 15 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 7, 2010.
Apr 29 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
May 10 2010	Consent to the filing of amicus briefs, in support of eithr party or of neither party, rerceived from counsel for the petitioners.
Jun 7 2010	Brief of petitioners Harry F. Connick, District Attorney, et al. filed.
Jun 7 2010	Joint appendix filed (4 volumes). (Statement of costs filed)
Jun 11 2010	Brief amicus curiae of District Attorneys Association of the State of New York filed.
Jun 14 2010	Brief amici curiae of National District Attorneys Association, et al. filed.
Jun 14 2010	Brief amici curiae of National League of Cities, et al. filed.
Jun 14 2010	Brief amicus curiae of Orleans Parish Assistant District Attorneys filed.

Jun 15 2010	The time to file respondent's brief on the merits is extended to and including August 6, 2010.
Jul 20 2010	CIRCULATED.
Aug 6 2010	Brief of respondent John Thompson filed. (Distributed)
Aug 9 2010	SET FOR ARGUMENT ON Wednesday, October 6, 2010.
Aug 10 2010	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 13 2010	Brief amici curiae of Alliance Defense Fund, and Cato Institute filed. (Distributed)
Aug 13 2010	Brief amici curiae of Former Federal Civil Rights Officials and Prosecutors filed. (Distributed)
Aug 13 2010	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Aug 13 2010	Brief amicus curiae of Innocence Network filed. (Distributed)
Aug 13 2010	Motion of Former Federal Civil Rights Officials and Prosecutors for leave to participate in oral argument as amici curiae and for divided argument filed.
Aug 13 2010	Brief amici curiae of Center on the Administration of Criminal Law, et al. filed. (Distributed)
Sep 7 2010	Reply of petitioners Harry F. Connick, District Attorney, et al. filed. (Distributed)
Sep 28 2010	Motion of Former Federal Civil Rights Officials and Prosecutors for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Oct 6 2010	Argued. For petitioners: Stuart K. Duncan, Appellate Chief, Baton Rouge, La. For repsondent: J. Gordon Cooney, Jr., Philadelphia, Pa.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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No. 09- ____

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris*, 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but in rare cases one violation may suffice. *Bryan County*, 520 U.S., at 409. The Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. *See Canton*, 489 U.S., at 390 n.10.

1.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

2.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation undermine prosecutors' absolute immunity recognized in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the *en banc* United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The *en banc* decision in *Thompson v. Connick* (App. 1a-50a) is reported at 578 F.3d 293 (5th Cir. 2009). The panel opinion is reported at 553 F.3d 836 (5th Cir. 2008) (App. 51a-113a). The district court's order denying summary judgment (App. 114a-144a) is not reported but is available at 2005 WL 3541035 (E.D. La. Nov. 15, 2005).

JURISDICTION

The *en banc* Fifth Circuit entered judgment on August 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1983, of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Factual Background

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. Approximately three weeks later, siblings Jay, Marie, and Michael LaGarde were the victims of an attempted armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the struggle, some of the robber's blood stained the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the robber's blood on it. App. 53a.

In January 1985, John Thompson ("Thompson") and Kevin Freeman ("Freeman") were arrested for the Liuzza murder. The LaGardes saw Thompson's picture in the newspaper and believed it was Thompson who had attempted to rob them. They contacted the Orleans Parish District Attorney's Office ("District Attorney's Office") and identified Thompson. App. 53a-54a.

At that time, the Orleans Parish District Attorney was Harry Connick ("Connick"). During Connick's twenty-nine year tenure from 1974 to 2003, between thirty and ninety assistant district attorneys worked in the office, screening between 12,000 and 17,000 charges per year, and prosecuting about half of those. App. 54a, 131a.

The LaGardes' armed robbery case was screened for institution of prosecution by assistant district attorney Bruce Whittaker ("Whittaker"), who received the police report, approved the case for prosecution, and filled out a Screening Action Form

indicating that armed robbery charges should be brought. After noting that a technician had taken a bloody swatch of Jay LaGarde's pants, Whittaker wrote on the form that the state "[m]ay wish to do blood test." He also recommended that the case be handled by Eric Dubelier ("Dubelier") as a special prosecutor because it involved the same defendant (Thompson) as the Liuzza murder case, which Dubelier was already handling. App. 54a-55a.

In March 1985, assistant district attorney James Williams ("Williams") handled a suppression hearing in Thompson's armed robbery case. Noting the reference to a blood test on the Screening Action Form, Williams stated in open court that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion—have a criminalist here on the 27th." The record does not reflect that Thompson's blood was ever tested by the District Attorney's Office. About one week before the armed robbery trial, however, the bloody pants swatch was sent for testing.[1] Two days before trial, Whittaker received a crime lab report showing that the armed robber's blood was type B. The report was never turned over to Thompson's attorneys. App. 55a.

Several days before trial, Dubelier had asked Williams to act as lead prosecutor. Accordingly, the armed robbery case was tried by Williams and assistant district attorney Gerry Deegan ("Deegan") on April 11 and 12, 1985. The Fifth Circuit panel

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[1] The record does not reveal who ordered the test. App. 55a, 35a.

described what happened as Thompson's armed robbery trial began:

> On the first day of trial, Deegan checked all of the evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the evidence into the court property room, but never checked in the pants swatch.

App. 56a. Williams did not mention the blood evidence at trial and relied primarily on eyewitness testimony. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison. App. 56a.

From May 6 to 8, 1985, Dubelier and Williams tried Thompson for the first-degree murder of Liuzza. The state sought the death penalty. At trial, Freeman testified that Thompson shot Liuzza. An acquaintance of Thompson testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. App. 56a-57a.

Thompson did not testify on his own behalf. Had he testified, the prosecution would have used his attempted armed robbery conviction to impeach him. The jury convicted Thompson of first-degree murder. During sentencing, Marie LaGarde testified about Thompson's attempt to rob her family and her brother's actions in fighting him off. Dubelier capitalized on this testimony in his closing argument, asserting that there easily could have been three more murders and that a death sentence was necessary to punish Thompson. Thompson was sentenced to death. App. 57a.

In the fourteen years after his murder conviction, Thompson exhausted all of his appeals. His execution was set for May 20, 1999. Then, in late April 1999, an investigator in Thompson's habeas proceedings discovered a microfiche copy of the lab report containing the blood type of the armed robbery perpetrator. Thompson was tested and found to be type O, making it impossible for him to have been the LaGardes' attacker. Thompson's attorneys presented this information to the District Attorney's Office, which then moved to stay Thompson's execution. App. 57a-58a.

The ensuing investigation uncovered that, "in 1994, Deegan [had] confessed to Michael Riehlmann ("Riehlmann"), a former assistant district attorney, that he had intentionally withheld the blood evidence." App. 58a. Deegan, who was suffering from terminal cancer, admitted this shortly after learning he had only months to live. Riehlmann did not tell anyone about Deegan's confession until the blood evidence was discovered in 1999. App. 58a.[2]

In 2001, Thompson applied for state post-conviction relief seeking vacatur of his murder conviction. The state district court resentenced him to life in prison. In 2002, the Louisiana Fourth Circuit Court of Appeal vacated Thompson's murder conviction, holding that the tainted attempted armed robbery conviction had

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[2] Riehlmann was sanctioned by the Louisiana Supreme Court for his failure to promptly report Deegan's misconduct. *See In Re Riehlmann*, 2004-0680 (La. 1/19/05); 891 So.2d 1239.

unconstitutionally deprived him of his right to testify in his own defense at his murder trial.[3] Thompson was retried for Liuzza's murder in 2003, and was found not guilty. App. 59a-60a.

B. Federal Proceedings

After his release, Thompson brought suit in the United States District Court for the Eastern District of Louisiana under 42 U.S.C. § 1983, alleging that the District Attorney's Office[4] violated his rights by failing to train prosecutors on their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).[5] *See generally Monell v. Department of Social Services*, 436 U.S. 658 (1978). App. 60a-61a, 116a, 132a-142a.[6]

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[3] *See State v. Thompson*, 2002-0361, pp. 8-9 (La. App. 4 Cir. 7/17/02); 825 So.2d 552, 557-58.

[4] Thompson also sued, in their individual and official capacities, Connick, Williams, and Dubelier, as well as Eddie Jordan, who held the position of Orleans Parish District Attorney in 2003. App. 60a.

[5] Thompson's additional state and federal claims were dismissed at various stages. His state claims were dismissed on summary judgment. His § 1983 claim against Connick individually was dismissed before trial. After Thompson rested, the district court dismissed his § 1985(3) conspiracy claim. At the close of evidence, the court ruled that two of the prosecutors, Dubelier and Williams, were not "policymakers" and thus not liable. App. 61a, 142a-143a. The only claim that proceeded to trial was Thompson's § 1983 claim against the office. His official capacity claims against the prosecutors are identical to his claim against the office itself. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); App. 132a.

[6] Thompson also sued the State of Louisiana separately for wrongful conviction. *See* LA. REV. STAT. ANN. § 15:572.8

In denying petitioners' motion for summary judgment, App. 138a-142a, the district court reasoned that, even absent a pattern of *Brady* violations, a jury could infer from a single violation that office training showed "deliberate indifference" to Thompson's rights. App. 138a-139a.[7] The court ruled that the following evidence raised a triable issue on deliberate indifference:

- the office "knows that *Brady* issues are complex and ambiguous," and yet lacked formal training and a written policy regarding *Brady* compliance;
- there had been *Brady* violations in unrelated cases for which the office could not identify corrective measures taken;

(2007). The State has offered to settle that lawsuit for the maximum statutory compensation, $150,000, plus up to $40,000 for prospective claims such as job training, education, and medical expenses. *Id.* § 572.8(H). The wrongful conviction suit is based on a different legal standard from Thompson's *Monell* claim against the District Attorney's Office. *See, e.g.*, § 572.8(A) (requiring proof that conviction was reversed or vacated and that petitioner is "factually innocent of the crime").

[7] The court relied on *Bryan County*, 520 U.S., at 418, and *Canton*, 489 U.S., at 390 n.10, as well as the Fifth Circuit's decision in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *abrogated on other grounds by Leatherman v. Tarrant County*, 507 U.S. 163, 167 (1993). App. 138a-139a. As discussed in Part I.C, *infra*, the court also relied on the Second Circuit's analysis in *Walker v. City of New York*, 974 F.2d 293, 300 (2nd Cir. 1992). App. 141a-142a.

- a judge had written a letter of concern to the office regarding *Brady* obligations;
- a later-written policy manual gave little guidance on *Brady* and mistakenly limited *Brady* to exculpatory evidence.

See generally App. 139a-140a (summarizing Plaintiff's summary judgment evidence).

Before trial, the parties stipulated that failure to disclose the lab report violated Thompson's rights under *Brady*. App. 61a n.7, 22a n.41. The jury found that, while the violation was not caused by any official policy, it was "substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures" to avoid such violations. App. 61a-64a. The jury awarded Thompson $14 million, and the court added just over $1 million in attorneys' fees. App. 64a-65a.

On December 19, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. App. 71a-113a. On March 11, 2009, the Fifth Circuit granted *en banc* rehearing and vacated the panel decision.[8] On March 18, 2009, the court asked counsel to brief a number of specific issues, including whether a single incident can give

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[8] Since the panel decision has been vacated, the judgment naming Connick, Dubelier, Williams and Jordan still remains. This Court's review should include correcting that glaring error by the district court. *See* App. 112a n.27 (explaining why the district court erred by including those defendants in the judgment). In this petition, Jordan's name has been substituted with that of the current Orleans Parish District Attorney, Leon Cannizzaro.

rise to failure-to-train liability, and whether a district attorney's culpability can be premised on a failure by independently-trained prosecutors to follow *Brady*. On August 10, 2009, an equally divided *en banc* court affirmed the verdict and damages. App. 2a. Two separate dissents, however, explained why the judgment should have been reversed. App. 2a-7a, 9a-44a.[9]

Writing for six members of the court, Judge Clement would have held that Thompson's evidence of a single *Brady* violation, accompanied only by "diffuse evidence of *Brady* misunderstanding among several assistant district attorneys," failed to meet the "heightened standards for culpability and causation" for failure-to-train liability. App. 13a-14a, 32a, 39a. Agreeing with Judge Clement, Judge Jones wrote separately to highlight "the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity." App. 2a. Judge Jones urged this Court to address whether attaching liability to a district attorney's office undermined the policies that led the Court, last term, unanimously to reaffirm absolute immunity for prosecutors in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). App. 2a-3a.

Petitioners now seek a writ of certiorari from this Court.

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[9] Judge Prado wrote a concurrence for five judges explaining why the judgment should be affirmed. App. 45a-50a.

REASONS FOR GRANTING THE PETITION

In her *en banc* dissent, Judge Edith Brown Clement captured why this case merits review:

> We believe it is imperative to explain why the result in this case should not encourage the extension of single incident municipal liability under *Monell*.

App. 9a. Judge Clement's fears are well founded. This case erases the distinction between municipal and vicarious liability, a distinction on which *Monell* was founded. It also caps a progressive unraveling of the tight limits on municipal liability for failing to train employees. And it does so with respect to a single instance of deliberate prosecutorial misconduct, thus expanding district attorneys' liability for countless decisions their prosecutors make every day.

The exceedingly high bar for failure-to-train liability is premised on the idea that municipalities are not vicariously liable for employee wrongdoing. *See Monell*, 436 U.S., at 691. Not only must a municipality callously ignore an obvious need for employee training, but its flawed training must directly cause the violation. *Canton*, 489 U.S., at 388-91; *Bryan County*, 520 U.S., at 404. These rigorous standards typically demand a persisting pattern of employee wrongdoing. *Bryan County*, 520 U.S., at 409.

But a single instance of wrongdoing may suffice in rare circumstances. This Court has hypothesized only one: failure to train police officers on using deadly force. *See Canton*, 489 U.S., at 390 n.10. The Court has never expanded

that exception, nor applied it to *prosecutors*, who have historically enjoyed special protections from suit. *See, e.g., Van de Kamp*, 129 S. Ct., at 859-60. Circuit courts have applied the exception to prosecutors' *Brady* obligations, but in two decades they have failed to agree on a consistent approach.

The Fifth Circuit's evenly split *en banc* decision emerges from this persisting confusion. The court has affirmed a jury verdict that inferred from prosecutors' egregious *Brady* violation that the office itself callously ignored *Brady* training. But the evidence showed no history of violations flagging a need for training, nor did it link any training flaw to the deliberate violation in Thompson's case. Moreover, the "uncontradicted and unimpeached" testimony, App. 31a, proved that office policy was to turn over the kind of report at issue, regardless of whether prosecutors thought it fell under *Brady*.

The Fifth Circuit should have heeded the warning that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). That is precisely what happened. Once a jury heard Thompson's story—a story being made into a film[10]—the outcome was not surprising. It awarded

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[10] The film, currently in production, will be entitled "The Nine Lives of John Thompson," and will star Matt Damon and Ben Affleck as the attorneys who exonerated Thompson. *See* http://movies.nytimes.com/movie/446373/The-Nine-Lives-of-John-Thompson/details (last visited October 29, 2009).

Thompson compensation "roughly equal to [the] office's annual operating budget."[11]

The Court should dispel the confusion over how *Canton* applies to district attorney's offices. Reviewing this case will allow the Court to develop its failure-to-train case law—which consists only of *Canton* and *Bryan County*—and to explain *Canton*'s elusive single-incident theory. Unique problems arise when the municipality at issue is a district attorney's office—such as whether an office can culpably fail to train professionally educated criminal attorneys, and whether any training could prevent prosecutors from deliberately violating the law. More generally, the Court should use this case to confirm that a failure-to-train claim based on a single incident is still governed by the rigorous culpability and causation standards of *Canton* and *Bryan County*. Allowing liability here nullifies those safeguards and exposes district attorney's offices to vicarious liability for a wide range of prosecutorial misconduct.

This case dovetails with the attention given to prosecutorial immunity last term in *Van de Kamp* and this term in *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065). Indeed, the Court's continuing commitment to

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[11] Becky Bohrer, *Court upholds $14 million judgment against Orleans DA's office*, ASSOC. PRESS, Aug. 10, 2009. To prevent a crippling seizure of assets, the office has been forced to consider bankruptcy. *Financial Woes Could Halt Justice System*, WDSU.com, Jan. 7, 2009, http://www.wdsu.com/money/18426227/detail.html (last visited October 29, 2009).

individual prosecutors' absolute immunity highlights another compelling reason for review. Last term in *Van de Kamp*, this Court extended absolute prosecutorial immunity to precisely the kind of failure-to-train claims presented in this case. Allowing those claims against an office on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

For both reasons, this Court should grant certiorari to review the judgment of the *en banc* Fifth Circuit.

I. THE COURT SHOULD CLARIFY WHEN DISTRICT ATTORNEY'S OFFICES MAY BE LIABLE FOR INDIVIDUAL PROSECUTORS' MISCONDUCT.

A. The Court's decisions narrowly limit failure-to-train liability for single incidents.

A municipality is not liable under section 1983 simply because it employs a tortfeasor, but only if a municipal policy or custom directly causes injury. *See, e.g., Bryan County*, 520 U.S., at 403; *Monell*, 436 U.S., at 690-94. When a policy is itself unconstitutional, or a policymaker orders unconstitutional action, proving fault and causation is straightforward. *See Bryan County*, 520 U.S., at 404; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). But "much more difficult problems of proof" arise when liability is premised, not on a municipality's action, but on its failure to act. *Bryan County*, 520 U.S., at 406. In such cases, "rigorous standards of culpability and causation must be applied to ensure that the

municipality is not held liable solely for the actions of its employee." *Id.*, at 405 (citing *Canton*, 489 U.S., at 391-92; *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) (plurality opinion)).

Those rigorous standards govern claims alleging a municipality has inadequately trained its employees. It is not enough to show that an employee was poorly trained, that better training would have thwarted his bad act, or that "an otherwise sound program has occasionally been negligently administered." *Canton*, 489 U.S., at 390-91; *see also Bryan County*, 520 U.S., at 408. Rather, inadequate training must demonstrate a municipality's "deliberate indifference"—a callous and conscious disregard for rights. *Canton*, 489 U.S., at 388-89 & n.7; *Bryan County*, 520 U.S., at 407. Additionally, an identified flaw in training must "actually cause" the particular injury. *Canton*, 489 U.S, at 391; *Bryan County*, 520 U.S., at 404. "Where a court fails to adhere to rigorous requirements of causation and culpability, municipal liability collapses into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

Failure-to-train liability ordinarily requires an underlying pattern of employee wrongdoing. *See, e.g., Bryan County*, 520 U.S., at 409. Without warning from a history of violations, a municipality's mere failure to adjust its training would not ordinarily show deliberate indifference, nor *directly* cause an employee's wrongdoing.[12] By

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[12] *See, e.g., Bryan County*, 520 U.S., at 407 (explaining that "[i]f a [training] program does not prevent constitutional violations, municipal decisionmakers *may eventually* be put

contrast, culpability and causation could be proven by a municipality's "continued adherence" to training whose flaws are exposed by repeated wrongdoing. *Id.*, at 407 (citing *Canton*, 489 U.S., at 390 n.10).[13]

In "a narrow range of circumstances," failure-to-train liability may be triggered by an employee's single violation. *Bryan County*, 520 U.S., at 409. The theory emerges from this language in *Canton*:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officer with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S., at 390 n.10 (citation omitted). Even in such a situation, *Canton* did not relax its stringent fault and causation requirements. *Id.*, at 391. Justice O'Connor's concurrence also cautioned against diluting those safeguards:

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on notice that a new program is called for") (emphasis added).

[13] *See, e.g., Bryan County*, 520 U.S., at 407-08 (observing that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training ... is the 'moving force' behind the plaintiff's injury") (citing *Canton*, 489 U.S, at 390-91).

> Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory could completely engulf *Monell*, imposing liability without fault.

Id., at 395 (O'Connor, J., concurring in part and dissenting in part).

Justice O'Connor revisited this subject in *Bryan County*. *Canton*, she explained, left open the "possibility" that failure-to-train liability might flow from a single violation. *Bryan County*, 520 U.S., at 409 (citing *Canton*, 489 U.S., at 390 & n.10). In doing so, however, *Canton* "simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan County*, 520 U.S., at 409.

The Court, then, has emphasized that plaintiffs suing a municipality for failure to train employees face an exceedingly high bar, especially in those rare situations where liability depends on a single incident. Furthermore, the only concrete example of such a situation is *Canton*'s hypothetical—which the Court has never since clarified—of a police department's failure to train officers about deadly force. As discussed in Parts I.B and I.C, *infra*, circuit courts have struggled to apply that hypothetical to cases like Thompson's.

B. In two decades, circuit courts have not developed a consistent approach to applying single-incident liability to *Brady* violations.

Federal circuit courts have recognized that single-incident liability is exceptional, and that failure-to-train usually demands a pattern of violations.[14] They confine single-incident liability largely to situations like *Canton*'s deadly force hypothetical.[15] In fact, until *Thompson*, the only time the Fifth Circuit had found single-incident liability was an excessive force case that closely tracked the *Canton* hypothetical. *See Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000); App. 16a-18a (discussing *Brown*). But now four circuits, including the Fifth, have confronted single-incident liability based on an alleged failure to train prosecutors or officers on *Brady*. Although these courts have applied the same *Canton* hypothetical, they do not agree on the proper analysis and they reach inconsistent results.

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[14] *See, e.g., Doe v. Broderick*, 225 F.3d 440, 456 (4th Cir. 2000); *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 874-75 (4th Cir. 1989); *Robles v. City of Fort Wayne*, 113 F.3d 732, 736 (7th Cir. 1997); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 392-93 (8th Cir. 2007) (en banc); *McDade v. West*, 223 F.3d 1135, 1141-42 (9th Cir. 2000); *Gold v. City of Miami*, 151 F.3d 1346, 1351 (11th Cir. 1998).

[15] *See, e.g., Young v. City of Providence*, 404 F.3d 4, 28-29 (1st Cir. 2005); *Brown v. Gray*, 227 F.3d 1278, 1286-87 (10th Cir. 2000).

The earliest decision in this area is *Walker v. City of New York*, 974 F.2d 293 (2nd Cir. 1992).[16] Building on *Canton*, *Walker* developed a three-part test to analyze a failure-to-train claim based on a prosecutor's covering up impeachment evidence. *Id.* at 294-95, 296-97 (discussing *Canton*, 489 U.S., at 390 n.10).[17] Under that test, failure to train prosecutors on *Brady* in 1971 could constitute deliberate indifference, because: (1) a district attorney knows "to a moral certainty that ADAs will acquire *Brady* material"; (2) in 1971, *Brady* obligations were not so obvious as to require no training; and (3) withholding *Brady* material "will virtually always lead to a substantial violation of constitutional rights." *Id.* at 300.

Walker, however, limited itself to the time period and evidence at issue. *Brady* was relatively new in 1971—the time of the violation in *Walker*—and the Second Circuit took "no view as to whether ... a jury finding [on deliberate indifference] would be supportable in other time periods, or with

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[16] From the outset, *Walker* observed that municipal liability raised "elusive questions," such as whether "a single incident [can] constitute an unlawful policy." *Id.*, at 296; *see also Robles*, 113 F.3d, at 735 (describing *Canton*'s failure-to-train standard as "somewhat elusive") (citation omitted).

[17] Generally, the test requires showing that (1) a policymaker knows "to a moral certainty" that employees will confront a given situation; (2) the situation "either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation"; and (3) the employee's "wrong choice ... will frequently cause the deprivation of a citizen's constitutional rights." 972 F.2d, at 297-98.

respect to other kinds of exculpatory evidence." *Id.* Unlike disclosure of impeachment evidence, *Walker* suggested "there might have been no need in 1971 to train ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime." *Id.* The Second Circuit has since re-affirmed *Walker*, while explaining that it is subject to the heightened culpability and causation standards emphasized by this Court in *Bryan County*.[18]

The Eighth Circuit recently confronted the same situation as *Walker*—failure-to-train based on a prosecutor's nondisclosure of impeachment material—but without mentioning *Walker*'s three-part test. *See Reasonover v. St. Louis County*, 447 F.3d 569, 583-84 (8th Cir. 2006). Instead, the court simply applied the stringent culpability and causation requirements from *Canton* and *Bryan County*. Thus, the court emphasized that allegedly inadequate training must not only show deliberate indifference, but also constitute "the moving force behind the constitutional violation." *Id.*, at 583 (quoting *Canton*, 489 U.S. at 388, 389). The evidence—that the prosecutor was aware of *Brady* obligations and that county policy was to disclose *Brady* material—failed to show that the particular violations "were the result of inadequate training or supervision." *Id.*, at 584. The court did not even

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[18] *See Amnesty America v. Town of West Hartford*, 361 F.3d 113, 130 n.10 (2nd Cir. 2004); *see also Aretakis v. Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *28-*30 (N.D.N.Y. Feb. 3, 2009) (slip op.) (applying *Walker* in light of heightened culpability and causation).

hint that a single *Brady* violation could underpin a failure-to-train claim.[19]

By contrast to the Eighth Circuit, the Sixth Circuit has, on two recent occasions, allowed failure-to-train claims based on single-incident *Brady* violations involving police officers. Both decisions implicitly held that a pattern of *Brady* violations was not required to establish failure-to-train liability. In neither case, however, did the court follow the Second Circuit's three-step approach in *Walker*.

For instance, in *Gregory v. City of Louisville*, the Sixth Circuit held that plaintiffs survive summary judgment "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has a 'highly predictable consequence' of" causing *Brady* violations. 444 F.3d 725, 753 (6th Cir. 2006). The officers had received no *Brady* training and the chief of police "believed officers were confused" about *Brady*. *Id.*, at 753-54. The court reasoned that, because disclosure obligations are "a significant constitutional component of police duties with obvious consequences for criminal defendants," evidence of failure to train on those duties satisfies culpability and causation. *Id.*, at 754. The court recently confirmed *Gregory* in *Moldowan v. City of Warren*, 578 F.3d 351, 393 (6th

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[19] Indeed, in rejecting plaintiff's claim that the county had a custom of failing to document *Brady* material, the court remarked that the plaintiff "presents no evidence of a widespread practice of violating police and prosecutorial obligations under *Brady*." *Id.*, at 584.

Cir. 2009). *Moldowan* reasoned that, because police[20] had a duty to turn over exculpatory evidence, *Canton* "dictates that the City has a corresponding obligation to adequately train its officers in that regard." *Id.* *Moldowan* said nothing about heightened causation.

In sum, the Second, Eighth, and Sixth Circuits have failed to arrive at a consistent approach to failure-to-train claims involving *Brady* obligations. The Second Circuit's *Walker* analysis, now nearly two decades old, has not been adopted by either the Eighth or the Sixth Circuits. The Sixth Circuit agrees with the Second, however, that single *Brady* violations can support a failure-to-train claim, whereas the Eighth has reached a different conclusion. Furthermore, the Second[21] and the Eighth Circuits subject such failure-to-train claims to the rigorous culpability and causation standards of *Canton* and *Bryan County*, whereas the Sixth Circuit is more lenient. Finally, the Second Circuit's seminal *Walker* test is ambiguous on its own terms: it suggests that obvious or later-occurring *Brady* violations may not support failure-to-train liability against a district attorney's office. None of the other circuits have developed that critical aspect of *Walker*.

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[20] *Moldowan* expressly held that *Brady* obligations apply to police officers. 578 F.3d, at 376-81. But the court did not indicate that its failure-to-train analysis would apply any differently to prosecutors—indeed, it found police officers had *Brady* obligations by analogy to prosecutors. *Id.*

[21] *See* note 18, *supra*, and accompanying text.

This confusion has resulted from lower courts attempting to apply *Canton*'s single-incident hypothetical—involving police training on deadly force—to the very different matter of *Brady* obligations. The divergent approaches reveal not only inconsistency but stagnation: courts have not approached the same situations in a way that will sensibly elucidate, over time, how *Canton* should apply to prosecutors. The Fifth Circuit's approach in *Thompson*, *infra* Part I.C., adds to the confusion and also emerges from contradictory circuit precedent.

C. The Fifth Circuit's approach in *Thompson* deepens the confusion.

The Fifth Circuit demonstrates the deep confusion plaguing this area of municipal liability. Not only does the court's approach in *Thompson* add another layer of uncertainty to the other circuits, but the Fifth Circuit's own case law now contradicts itself on whether single *Brady* violations can support a failure-to-train claim. Indeed, the area is so murky that, four years before *Thompson*, a Fifth Circuit panel examined the record of the same district attorney's office and found no history of *Brady* violations showing deliberate indifference.

The Fifth Circuit's approach in this area resembles the Second Circuit's, at least superficially. Thompson's jury, for instance, was instructed under the three-part *Walker* test. App. 94a & n.20. The district court denied summary judgment based on the *Walker* analysis, App. 141a-142a, and the panel relied on *Walker* to support the

conclusion that "Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent." App. 80a (citing *Walker*, 974 F.2d, at 300); *see also generally* App. 72a-80a (discussing whether pattern of violations is necessary).

But there was no attempt to grapple, as *Walker* did, with the nuances of *Brady*—such as how deliberate indifference applies to a violation occurring long after *Brady* or concerning different *Brady* material. Thompson's violation occurred fourteen years after Walker's, and, since it involved exculpatory as opposed to impeachment evidence, it was an obvious breach. *Cf. Walker*, 974 F.2d at 300. Furthermore, Thompson presented evidence of diffuse disagreement about *Brady* not directly linked to the particular violation, *see infra* Part I.D, evidence that might satisfy Sixth Circuit but fail Eighth Circuit standards. *See supra* Part I.C. Such evidence, moreover, would likely fail in the Second Circuit, given its confirmation that the *Walker* test incorporates heightened culpability and causation. *See Amnesty America*, 361 F.3d at 130 n.10.[22]

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[22] *And cf. Babi-Ali v. City of New York*, 979 F.Supp. 268, 274 (S.D.N.Y. 1997) (finding *Walker* "still applies" to a claim raised "thirty-four years after the *Brady* decision," but in which plaintiff alleged "that the conduct of the Queens County District Attorney's Office indicates a history of mishandling *Brady* material"); *see also, e.g., Gausvik v. Perez*, 239 F.Supp.2d 1047, 1057 (E.D. Wash. 2002) (distinguishing *Walker* in part because "[p]laintiff was prosecuted in 1995, over thirty years after Brady was decided").

The Fifth Circuit's own case law mirrors the inter-circuit confusion. Until *Thompson*, the Fifth Circuit had "consistently rejected application of the single incident exception." *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000); App. 16a.[23] Indeed, only four years before Thompson's federal trial, the Fifth Circuit had addressed *Brady* enforcement by Orleans Parish District Attorney Harry Connick—the *same* district attorney over the *same* office during the *same* time period. *See Cousin v. Small*, 325 F.3d 627, 637-38 (5th Cir. 2003). *Cousin* found that Connick's "enforcement of the [*Brady*] policy was not patently inadequate or likely to result in constitutional violations," and observed that:

> ... Connick's office handled tens of thousands of criminal cases over the relevant time period, and we agree with the [district] court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's

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[23] *See also Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 288 (5th Cir. 2002); *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (rejecting single-incident liability); App. 16a n.24. The one exception was on remand in *Bryan County* itself, which featured inadequate training identical to the *Canton* hypothetical. *See Brown v. Bryan County*, 219 F.3d 450, 458-61 (5th Cir. 2000); App. 16a-17a (discussing *Brown*). Even so, one judge dissented in *Brown*, urging the panel had misapplied circuit precedent on single-incident liability and further arguing that this Court had *narrowed* the theory in *Bryan County*. *See Brown*, 219 F.3d at 474-77 (DeMoss, J., dissenting).

> deliberate indifference to violations of *Brady* rights.

Id.

Cousin thus considered—and approved—the same office's record of *Brady* enforcement during the time period covering Thompson's case. *Id.*, at 630, 637.[24] Furthermore, *Cousin* required a pattern of *Brady* violations: it did not even hint that one violation could suffice. *Id.*, at 637 (explaining that "[t]o satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations").[25]

In sum, *Thompson* deepens persisting uncertainty, both inside and outside the Fifth Circuit, over when failure-to-train liability may attach to a single *Brady* violation. The issue having stagnated for the past two decades, *Thompson* signals the time is ripe for this Court's intervention. As the next section demonstrates,

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[24] Judge Prado's *Thompson* panel opinion distinguished *Cousin* on the ground that the plaintiff conceded that the office's *Brady* training was adequate in 1995, which "says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985." App. 88a-89a. But that misses *Cousin*'s significance. As Judge Clement explained, *Cousin* "sustained the district court's conclusion that twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) reveal no pattern of *Brady* violations." App. 25a.

[25] *See also Burge v. St. Tammany Parish*, 336 F.3d 363, 372-73 (5th Cir. 2003) (declining plaintiff's "argument that the single-incident exception should be expanded based on the latent nature of a *Brady* claim").

infra Part I.D, *Thompson* collapses municipal and *respondeat superior* liability for a potentially wide range of prosecutorial misconduct and thus dramatizes the hazards of applying single-incident liability to a district attorney's office.

D. The Fifth Circuit has effectively imposed vicarious liability on a district attorney's office.

The work of district attorney's offices embraces countless judgments by individual prosecutors regarding evidence disclosure. With *Thompson*, the Fifth Circuit has essentially adopted a *per se* rule that offices failing to train adequately on *Brady* could be liable for every violation committed in their offices—regardless of how rarely or under what circumstances they occur. And this rule logically embraces any other violation involving a prosecutor's lapse of discretionary judgment. App. 27a. That rule cannot be right: it dilutes *Canton*'s "rigorous requirements of culpability and causation," *Bryan County*, 520 U.S., at 415, exposing district attorney's offices to vicarious liability. The Court should grant certiorari to temper *Canton*'s application to this fertile source of damaging municipal liability.

(1). Thompson failed to show culpability and causation.

Judge Clement's *en banc* dissent correctly explains that the culpability inquiry must focus on the kind of undisclosed evidence at issue, and whether there was an obvious need to train

prosecutors about it. App. 14a-18a, 22a-24a.[26] Thus, the question was not whether the office culpably failed to train about *Brady* generally, but whether it culpably "fail[ed] to train on how to handle specific types of evidence such as the crime report at issue." App. 24a.[27]

Thompson's evidence failed that standard. Principally, he could rely only on the single violation because he proved no pattern of similar incidents. App. 25a. In tens of thousands of cases handled by Connick's office in the previous decade, "only four convictions were overturned based on *Brady* violations ... and there was not a single instance involving the failure to disclose a crime lab report or other scientific evidence." App. 25a. Nor could Thompson identify any reported decision alerting Connick to train on this issue. After all, the Fifth Circuit had already found no pattern of *Brady* violations by his office during the relevant period. App. 26a; *see supra* Part I.C.

Against this, Thompson merely offered "generic generalizations" that "could ... support a deliberate indifference finding against any prosecutor's office for nearly any error that leads to a reversal of a conviction." App. 27a-28a. Evidence that *Brady* issues were common, or that prosecutors thought *Brady* had "gray areas," proved nothing. As Judge

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[26] *See, e.g., Canton*, 489 U.S., at 391 (requiring that "the identified deficiency in a city's training program must be closely related to the ultimate injury").

[27] *Cf. Walker*, 974 F.2d, at 300 (reserving question of how deliberate indifference applies "with respect to other kinds of exculpatory evidence").

Clement explained, such evidence would apply equally to any district attorney's office, and would implicate every discretionary issue prosecutors confront, including "*Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." App. 26a-27a.

Prosecutors, moreover, are not just any municipal employees. They are "licensed attorneys ... personally responsible as professionals to know what *Brady* entails and ... to understand the 'gray areas.'" App. 29a. This is the last case where diffuse evidence of *Brady* confusion should show deliberate indifference by a district attorney, who is "entitled to assume that attorneys will abide by the standards of the profession." App. 29a. It would, moreover, be especially inappropriate where—despite theoretical disagreements over *Brady*—"every single witness who was asked stated that they would have disclosed the crime lab report had they known about it." App. 31a.

The evidence also failed heightened causation. As Judge Clement explained, Thompson was required to establish "by substantial evidence" that "unfamiliarity with *Brady* obligations with respect to this lab report was the *actual* cause—the *moving force*—of this constitutional violation." App. 33a (emphasis in original). Thompson did not meet that stringent standard.

Thompson's sole theory of causation was that one or more assistant district attorneys did not disclose the report because they misunderstood their obligation to produce it, and that *Brady*

training would have prevented that. App. 35a-36a. The evidence of what led to nondisclosure was murky, App. 33a, but at most Thompson showed some possible confusion about *Brady*'s application to impeachment evidence, and some disagreement about whether *Brady* reached potentially exculpatory lab reports. App. 37a-38a.

This evidence cannot show that failure to train on *Brady* was "the actual cause and moving force behind the constitutional violation." App. 38a. For instance, any confusion about *Brady*'s coverage of impeachment evidence was irrelevant: the lab report was exculpatory, not impeaching. App. 38a-39a. Furthermore, any disagreement about whether *Brady* reached the report could not overcome the uncontradicted evidence that office policy was to turn over *all* lab reports regardless. App. 31a. The same witness who testified that *Brady* did not reach every lab report also "stated unequivocally that *all* technical or scientific reports, like the lab report, were required to be turned over to a defendant." App. 38a (emphasis in original).

Ultimately, as Judge Clement explained, Thompson's causation argument boiled down to insisting that a jury could have rejected the theory that a "single rogue prosecutor" was solely responsible for hiding the evidence. App. 36a-37a. But regardless of whether one or more of the four prosecutors participated in the nondisclosure, Thompson had to prove a "direct causal link" between the nondisclosure and *office policy*. *Bryan*

County, 520 U.S., at 404.[28] It was not enough to show that absence of *Brady* training made this violation "more likely," *see id.*, at 410-11, nor "that an injury ... could have been avoided if [prosecutors] had had better or more training." *Canton*, 489 U.S., at 391. Rather, *Canton* requires that "the identified deficiency in a ... training program must be *closely related* to the ultimate injury," 489 U.S., at 391 (emphasis added). Thompson's proof failed that standard. App. 37a-39a.

(2). Applying "failure-to-train" to this single incident collapses municipal and vicarious liability.

Even as it allowed municipal liability under § 1983, this Court cautioned that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, ... on a *respondeat superior* theory." *Monell*, 436 U.S., at 691 (emphasis in original). Both *Canton* and *Bryan County* reissued that warning. *See Canton*, 489 U.S., at 391-92; *Bryan County*, 520 U.S., at 415. Justice O'Connor even predicted that allowing certain inadequate training claims "to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and

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[28] *See, e.g.*, App. 37a (explaining that Thompson was required to prove that "the assistant district attorney (or attorneys) responsible for the constitutional violation did not understand *Brady*, that this lack of understanding caused the failure to produce the report, and that *Brady* training could have resolved this lack of understanding").

dissenting in part). Now *Thompson* has fulfilled Justice O'Connor's prediction. The *en banc* Fifth Circuit has allowed a jury—based solely on the single instance of deliberate prosecutorial misconduct—to impose liability on a district attorney's office, where the evidence failed to establish that the *office* was at fault.

The essence of vicarious liability is to make an employer answerable for an employee's wrongdoing simply by virtue of the employment relationship. That can be the only fair description of the basis for liability in this case. No history of similar violations should have alerted Connick that he needed training targeted to this sort of *Brady* problem. Nothing warned him not to rely on his professional prosecutors' independent training and judgment in obeying *Brady*. And nothing warned him that the existing office policy—to turn over *all* crime lab reports, regardless of whether they fell under *Brady*, App. 31a-32a, 38a—would not resolve exactly the situation presented in Thompson's case. In sum, no evidence showed that Connick or his office had the callous, conscious disregard *Canton* demands.

Nor did any evidence establish a tangible link between the office's lack of *Brady* training and the nondisclosure in Thompson's case. Instead, Thompson merely presented a haze of generalizations. The fact that certain prosecutors expressed doubts after the fact about their *Brady* obligations shed no light on what *actually* caused the violation in Thompson's case. And, again, no evidence overcame the fact that the office's actual policy was to turn over all crime lab reports,

regardless of *Brady*. App. 31a-32a, 38a. The jury, after all, affirmatively found that Thompson's violation was *not* caused by an actual office policy. App. 39a, 64a. The events that led to the deliberate nondisclosure in Thompson's case are now impossible to reconstruct, but one thing is clear: the office's *training policy* did not cause it.

What allowed the Fifth Circuit to dilute culpability and causation is *Canton*'s single-incident theory—*i.e.*, *Canton*'s suggestion that certain duties so obviously cry out for targeted training that a municipality's failure to do so creates liability, even absent a pattern of violations. *See* 489 U.S., at 390 & n.10. But whatever the breadth of single-incident liability, the Court should clarify that it has little application to this case. Absent a warning history of particular violations, there can be no obvious need to train prosecutors who are themselves professionally trained to understand and apply the law. Moreover, a district attorney's office cannot be culpable for, or the moving force behind, a single constitutional injury intentionally committed by prosecutors. No amount of training could prevent such flagrantly unlawful and unethical acts.

The time is long past due for the Court to revisit the subject of single-incident liability in failure-to-train cases. *Canton* embraced it in theory twenty years ago, but the Court has not clarified its scope since. The only guidance remains the single hypothetical in *Canton*'s footnote. But, in over two decades, the circuit courts have not managed to build from that hypothetical a coherent, consistent approach to the subject, particularly in situations

involving prosecutors. The inevitable result is *Thompson* itself: because the Fifth Circuit "fail[ed] to adhere to rigorous requirements of causation and culpability, municipal liability collapse[d] into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

II. THE COURT SHOULD ALSO REVIEW WHETHER HOLDING A DISTRICT ATTORNEY'S OFFICE LIABLE UNDER *CANTON* EVISCERATES PROSECUTORS' ABSOLUTE IMMUNITY.

The Fifth Circuit's overextension of single-incident liability not only contravenes *Canton*, but also undermines the absolute immunity that shields individual prosecutors from failure-to-train claims. Chief Judge Jones' separate *en banc* dissent highlights this distinct and compelling reason for review. App. 2a-7a. Last term, this Court unanimously extended absolute immunity to claims that supervising prosecutors failed to train line prosecutors on their obligations to disclose impeachment evidence. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 864-65 (2009). The Court should now decide whether holding the office itself liable on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

Absolute immunity has long protected prosecutors from litigation attacking the exercise of their core public functions. *See generally Imbler v. Pachtman*, 424 U.S. 409 (1976). Without this barrier, harassing litigation risks squandering a prosecutor's limited resources and diluting his judgment. *See Van de Kamp*, 129 S.Ct., at 860

(describing policies underlying absolute immunity as avoiding "a deflection of the prosecutor's energies from his public duties" and "shad[ing] his decisions instead of exercising his independence of judgment required by the public trust"). *Van de Kamp* extended absolute immunity to prosecutors' duties to supervise the management and disclosure of impeachment evidence. *Id.*, at 861-64. Thus, individual prosecutors are immune from suits alleging failure "to adequately train and supervise deputy district attorneys" on disclosure obligations, and "fail[ure] to create any system" for managing impeachment evidence. *Id.*, at 861; *see also generally Giglio v. United States*, 405 U.S. 150 (1972) (establishing duty to disclose impeachment evidence).

Municipalities, of course, cannot claim personal immunities against § 1983 litigation, *see Kentucky v. Graham*, 473 U.S. 159, 167 (1985),[29] yet holding

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[29] Nor could the district attorney's office in this case claim Eleventh Amendment immunity. *See Hudson v. City of New Orleans*, 174 F.3d 677, 682-691 (5th Cir. 1999) (concluding that Orleans Parish District Attorney's Office is not an arm of the state and thus not entitled to Eleventh Amendment immunity). Since the issue depends on state structural and funding policies, the Eleventh Amendment immunity of district attorneys' offices varies considerably. *Compare Del Campo v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008) (California district attorneys entitled to Eleventh Amendment immunity); *Brooks v. George County*, 84 F.3d 157, 168 (5th Cir. 1999) (Mississippi district attorneys); *Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991) (Oklahoma district attorneys), *with Carter v. City of Philadelphia*, 181 F.3d 339, 355 (3rd Cir. 1999) (Pennsylvania district attorneys not entitled to Eleventh Amendment

an office liable on precisely the same claims from which prosecutors are absolutely immune sits uncomfortably with *Van de Kamp*. As Chief Judge Jones noted, "every reason advanced in *Van de Kamp* and *Imbler* for protecting the independence and integrity of prosecutors in trial-related actions and supervision suggests that holding a government entity liable in their stead for the same violations is simply untenable." App. 6a. The "office," after all, does not act: rather, a web of individual prosecutors acts on its behalf. A failure-to-train claim against the office will impose the same judgment-distorting burdens of litigation on the same prosecutors who are nominally protected from them by absolute immunity. *See* App. 4a (explaining that "[a]uthorizing Section 1983 liability against the office creates the same stress on the proper function of the office" as suing the individual prosecutors).

Van de Kamp stressed that the primary aim of absolute immunity was "the interest in protecting the proper functioning of the *office*, rather than the interest in protecting its occupant." 129 S.Ct., at 862 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (emphasis added)). In light of that rationale, this Court should resolve whether allowing failure-to-train liability against the office devalues the absolute immunity of individual prosecutors and their supervisors. *Van de Kamp*, for instance, held that absolute immunity barred suit against a line

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immunity); *Crane v. State of Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (Texas district attorneys).

prosecutor for a *Giglio* violation *and also against* his supervisor for failure to train him on *Giglio*. The Court reasoned that "*Imbler*'s basic fear" was implicated in both situations, *i.e.* that "the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks." *Van de Kamp*, 129 S.Ct., at 862.

This case starkly illustrates the tension between *Van de Kamp*'s extension of absolute immunity to supervisory prosecutors, on the one hand, and holding prosecutorial offices liable for failure to train, on the other. That tension is only heightened by the fact that "the jury was permitted to infer Section 1983 deliberate indifference and causation based on a single incident of withheld *Brady* evidence." App. 5a. Even the prosecutors who intentionally withheld exculpatory evidence would have been shielded by absolute immunity. But—without any evidence of a pattern of similar wrongdoing, and without any evidence that the violation was actually caused by inadequate training—a jury has now been permitted to assess $14 million in damages against the office that employed the prosecutors. This Court should grant certiorari to consider whether that result is compatible with *Van de Kamp* and the absolute prosecutorial immunity it upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

REVISED AUGUST 27, 2009
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-30443

[Filed August 10, 2009]

Charles R. Fulbruge III Clerk

JOHN THOMPSON	)
	)
Plaintiff-Appellee	)
	)
v.	)
	)
HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE	)
	)
Defendants-Appellants	)
	)

Appeals from the United States District Court
for the Eastern District of Louisiana

Before JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, BENAVIDES, STEWART, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges.[1]

PER CURIAM:

By reason of an equally divided en banc court, the decision of the district court is AFFIRMED. The panel opinion was vacated by the grant of rehearing en banc.

JONES, Chief Judge, would reverse for additional reasons:

I concur in Judge Clement's fine opinion and would also highlight the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity. The Supreme Court ought to address whether holding governmental entities liable for Section 1983 violations is consistent with absolute prosecutorial immunity from such violations. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).

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[1] Judge Dennis is recused and did not participate in this decision.

The Supreme Court recently issued a unanimous opinion affording absolute immunity from personal Section 1983 liability to Los Angeles County's chief prosecutors for failure to train or supervise their staff, or failure to establish appropriate systems in regard to the advocacy function of their office. *Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S. Ct. 855 (2009). Much as in this case, a plaintiff had been freed from custody after he discovered that important evidence had been withheld during his prosecution. The Court made a number of observations that are prescient of the circumstances leading to liability in this case. These bear repeating or paraphrasing with my editorial analogies to prosecutor's offices.

1. The 'public trust' in the prosecutor's office would suffer were he to have in mind his own potential liability when making prosecutorial decisions. *Van de Kamp*, 129 S. Ct. at 860 (quoting *Imbler*). Likewise, public confidence will erode if the public believe a prosecutorial office is motivated by the impulse to cover itself when challenged by difficult prosecutions.

2. The frequency with which criminal defendants bring suits creates real fear about public perception as well as the independence of judgment exercised by prosecutors under the constant threat of lawsuits. *Van de Kamp, id.*

3. Such suits, whether against the prosecutor – or the office –, " 'often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.' " *Van de Kamp, id.* (quoting *Imbler*). *See* footnote 41 of Judge Clement's opinion.

4. A prosecutor " 'inevitably makes many decisions that could engender colorable claims of constitutional deprivation.' " *Van de Kamp, id.* (quoting *Imbler*). *See* Judge Clement's opinion at text adjoining footnote 53.

5. Defending against such claims, " 'often years after they were made, could impose unique and intolerable burdens upon a prosecutor [or office] responsible annually for hundreds of indictments and trials.' " *Van de Kamp, id.* (quoting *Imbler*). A crucial witness here had died, and other prosecutors could not recall this case as distinct from the hundreds or thousands they had handled.

6. The Court also said: "We do not see how...differences in the pattern of liability among a group of prosecutors in a single office [*i.e.* distinguishing between the supervisors and the line prosecutors] could alleviate *Imbler's* basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks." *Van de Kamp*, 129 S. Ct. at 862. Moreover, ". . . 'it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance.' (internal citation omitted)." *Id.* Authorizing Section 1983 liability against the office creates the same stress on the proper functioning of the office.

7. With regard to liability for supervisory actions related to the trial process, the Court held that "a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised

inadequately, on the other, would seem very much alike." *Van de Kamp*, 129 S. Ct. at 863.

8. "It will often prove difficult to draw a line between *general* office supervision or training and *specific* supervision or training related to a particular case." *Van de Kamp*, *id.* "To permit claims based upon the former is inevitably to permit the bringing of claims that include the latter." *Id.* In this case, the jury was permitted to infer Section 1983 deliberate indifference and causation based on a single incident of withheld *Brady* evidence.

9. "[O]ne cannot easily distinguish, for immunity purposes, between claims based upon training or supervisory failures related to *Giglio* [at issue in *Van de Kamp*] and similar claims related to other constitutional matters (obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), for example). And that being so, every consideration that *Imbler* mentions militates in favor of immunity." *Id.*

10. If the threat of damages liability for a trial error could lead a trial prosecutor to take account of that risk when making trial-related decisions, so, too, could the threat of office liability for the same error affect the decisions of other prosecutors. *Van de Kamp*, 129 S. Ct. at 863. So, too, could the office policies become infected with risk aversion.

11. Because "better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit [in *Van de Kamp*] would encourage claims [by other criminal defendants], in effect claiming damages for (trial-related) training or supervisory failings." *Van de*

Kamp, *id*. Such suits could, "given the complexity of the constitutional issues," "pose substantial danger of liability even to the honest prosecutor." *Id*. (quoting *Imbler*). Indeed, only four convictions of the New Orleans District Attorney's office were overturned for *Brady* violations in the decade preceding Thompson's conviction (Judge Clement's opinion at footnotes 49-50), and none involved lab reports.

12. Practical anomalies result from the coexistence of absolute prosecutorial immunity with potential *Monell* liability of the prosecutor's office. As the Court observed in *Van de Kamp*, *id*., "[s]mall prosecution offices where supervisors can personally participate in all of the cases would...remain immune from [damage suits]; but large offices, making use of more general office-wide supervision and training, would not."

13. "Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*." *Van de Kamp*, *id*. This seems true whether the potential defendant is a supervisor, as in *Van de Kamp*, or the governmental office itself, as in this case.

The Court has not specifically excluded municipal Section 1983 liability for prosecutorial offices, nor has it ruled that they are vulnerable. Still, every reason advanced in *Van de Kamp* and *Imbler* for protecting the independence and integrity of prosecutors in trial-related actions and supervision suggests that holding a government entity liable in their stead for the same violations is simply untenable. The Court recognized, "as Chief Judge Hand pointed out [in *Imbler*], that sometimes such immunity deprives a plaintiff of

compensation that he undoubtedly merits; but the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here." *Van de Kamp*, 129 S. Ct at 864. Today's judgment raises issues that will continue to plague honest prosecutors' offices.

E. Grady Jolly, Specially Concurring:

Ordinarily, when an en banc case results in a tie vote, we affirm the district court judgment without opinion. That is the way I would prefer it today. However, notwithstanding that there is no majority opinion, and that no opinion today will bind any court or future party in this circuit, each side has now written for publication, and judges are joining one or the other of the respective opinions. I join Judge Clement's opinion because, as between the two, it shows the intellectual fortitude of meeting head-on, in a specific workmanlike manner, the truly difficult legal issues presented by this case.

EDITH BROWN CLEMENT, Circuit Judge, with whom JONES, Chief Judge, and JOLLY, SMITH, GARZA, and OWEN, Circuit Judges, join, would reverse the district court for the following reasons:

We believe it imperative to explain why the result in this case should not encourage the extension of single incident municipal liability under *Monell*. John Thompson, the plaintiff-appellee, was convicted of murder and spent fourteen years on death row for a crime he did not commit because prosecutors failed to turn over a lab report in a related case. In this 42 U.S.C. § 1983 case, he sought compensation for the years spent in prison and on death row. The jury awarded Thompson $14 million against the Orleans Parish District Attorney in his official capacity. This appeal asks whether Harry Connick, the District Attorney, was *deliberately indifferent* to an obvious need to train his assistants on their obligations under *Brady v. Maryland*;[1] it further asks whether a lack in *Brady* training was the *moving force* behind Thompson's constitutional injury. The district court, and a panel of this court, held that the evidence was legally sufficient to support both of these claims. The panel opinion was vacated by our order for en banc rehearing.

Only under the most limited circumstances may a municipality be held liable for the individual constitutional torts of its employees. Considering the strict standards of culpability and causation applicable here, we conclude that the evidence supporting Thompson's claim was legally inadequate to hold the

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[1] 373 U.S. 83 (1963).

District Attorney's Office liable for this employee failure. Along similar lines, we also conclude that the jury instructions given on "deliberate indifference" were plainly erroneous.

FACTS

In 1985, a few weeks before his murder trial, John Thompson was tried and convicted of attempted armed robbery. Because of the attempted armed robbery conviction, Thompson decided not to testify in his own defense in his trial for the murder of Raymond T. Liuzza, Jr. Thompson was convicted of murder and sentenced to death.

Fourteen years later, in 1999, an investigator in Thompson's habeas proceedings discovered that prosecutors had failed to turn over a crime lab report in the attempted armed robbery case. That lab report indicated that the perpetrator had type B blood. Because Thompson has type O blood, the attempted armed robbery conviction was vacated. In 2002, the Louisiana Fourth Circuit Court of Appeals granted post-conviction relief and reversed Thompson's murder conviction, holding that the improper attempted armed robbery conviction had unconstitutionally deprived Thompson of his right to testify in his own defense at his murder trial.[2] Thompson was retried for Liuzza's murder in 2003 and found not guilty.

After his release, Thompson brought suit alleging various claims against the District Attorney's Office, Connick, James Williams, Eric Dubelier, and Eddie

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[2] *State v. Thompson*, 825 So. 2d 552, 557–58 (La. Ct. App. 2002).

Jordan—the District Attorney in 2003—in their official capacities; and Connick in his individual capacity (collectively, "Defendants").[3] The only claim that proceeded to trial was a claim under § 1983 for wrongful suppression of exculpatory evidence in violation of *Brady v. Maryland*. Thompson presented two theories of liability to the jury: (1) that the *Brady* violation was due to an unconstitutional official policy of the District Attorney's Office, and (2) that the *Brady* violation was caused by Connick's deliberate indifference to an obvious need to train, monitor, or supervise his prosecutors. The jury found that the *Brady* violation was not due to an official policy of the District Attorney's Office, but was due to a failure to train. The jury awarded Thompson $14 million in damages. Defendants filed timely motions for judgment as a matter of law—before and after the verdict—as well as a motion to amend or alter the judgment and a motion for a new trial.[4] The district

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[3] Connick was dismissed in his individual capacity prior to trial.

[4] Defendants correctly argue that the district court erred in naming Connick, Dubelier, and Williams in the judgment and abused its discretion by denying their Rule 59(e) motion to alter or amend the judgment to correct this error. We have previously held that it is proper to dismiss allegations against municipal officers in their official capacities when the allegations duplicate claims against the governmental entity itself. *See Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (noting that the official-capacity claims were duplicative of the claims against the governmental entities); *cf.* FED. R. CIV. P. 25(d) (providing that when a public officer is sued in his official capacity and then ceases to hold office, his successor is automatically substituted as a party). Because it is undisputed that the claims against Connick, Dubelier, and Williams, who are no longer employed at the District Attorney's Office, are duplicative of the claims against

court denied all of these motions, and Defendants appealed.

STANDARD OF REVIEW AND APPLICABLE LAW

We review the denial of a motion for judgment as a matter of law *de novo*.[5] Judgment as a matter of law is appropriate if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[6] Under this standard, we consider all of the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion."[7] Substantial evidence —defined as "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions"—must be presented by the non-moving party, and a "mere scintilla" is insufficient.[8] "[A] jury's freedom to draw reasonable inferences does not extend so far as to allow the jury to draw an inference which

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the governmental entity, they should not have been named in the judgment.

[5] *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 403 (5th Cir. 2009).

[6] FED. R. CIV. P. 50(a).

[7] *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997).

[8] *Id.*

amounts to mere speculation and conjecture."[9] In reviewing the record, we "give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached."[10]

Because we are reviewing a *Monell*[11] verdict against a government entity, our evidentiary review must take into account that § 1983 *Monell* liability is fundamentally different from an entity's vicarious liability, predicated on *respondeat superior*, for its employees' ordinary misconduct. Thus, when a plaintiff seeks to impose § 1983 liability on a municipality for its failure to train its employees, normal tort standards are replaced with heightened standards of culpability and causation.[12] Liability will only attach if the municipality was *deliberately indifferent* to the constitutional rights of citizens—a showing of negligence or even gross negligence will not suffice.[13] Errors of judgment do not alone prove deliberate indifference, nor is such heightened culpability established simply by showing that a municipality could have ordered more or different training or even misjudged whether training was

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[9] *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 352 (5th Cir. 1985) (quotation omitted).

[10] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (quotation omitted).

[11] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[12] *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

[13] *Id.* at 388 & n.7.

necessary. Similarly, to satisfy causation, the plaintiff must demonstrate that the failure to train was the *moving force* behind the constitutional violation—"but for" causation is not enough.[14] The Supreme Court has repeatedly cautioned that if we neglect these stringent standards, we risk collapsing the distinction between vicarious liability and direct liability.[15] Heightened standards also guard against the potentially "endless exercise of second-guessing municipal employee-training programs," a task for which federal courts are ill suited.[16]

A. Heightened Culpability: *Deliberate Indifference*

Municipal liability attaches "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers. Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983."[17] Because a municipality rarely decides not to train its employees out of sheer contempt for citizens' rights, deliberate indifference must be proven circumstantially. Deliberate indifference "generally requires" a showing that the policymaker was made aware of the training

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[14] *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997) (hereinafter, *Bryan County*).

[15] *Id.* at 415; *City of Canton*, 489 U.S. at 391-92.

[16] *City of Canton*, 489 U.S. at 392.

[17] *Id.* at 389 (internal quotation and citation omitted).

deficiencies by "at least a pattern" of similar deprivations.[18] Absent a pattern, in certain unique circumstances, the plaintiff can establish liability based upon a single violation of constitutional rights. In such a case, a failure to train constitutes municipal policy only where the need for training was "so obvious" that a failure to do so would mean that the policymaker was deliberately indifferent to constitutional rights.[19] A need for training is considered sufficiently obvious only when the deprivation of constitutional rights is a "highly predictable consequence" of the training deficiency.[20] "Deliberate indifference" implies a sense of callousness[21] and is "treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that [the] setting [of] policy presupposes."[22] The

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[18] *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003) (finding no deliberate indifference as a matter of law with respect to sheriff's office training on *Brady* obligations).

[19] *City of Canton*, 489 U.S. at 390.

[20] *Bryan County*, 520 U.S. at 409; *see also City of Canton*, 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part) (finding that single incident liability for a failure to train only obtains where "[t]he constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an *extremely high risk* that constitutional violations will ensue" (emphasis added)).

[21] *See Estelle v. Gamble*, 429 U.S. 97, 106 n.14 (1976); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994).

[22] *Bryan County*, 520 U.S. at 419 (Souter, J., dissenting) (internal footnote omitted).

Supreme Court has given us a hypothetical example of such callousness: giving untrained police officers firearms and ordering them to arrest fleeing suspects. In such a situation, the deprivation of constitutional rights, *i.e.*, the use of excessive force, is a highly predictable consequence of the lack of training, and therefore the need for such training is sufficiently obvious.[23]

Our court has considered single violation liability several times, and, with only one exception in some thirty years since *Monell*, has "consistently rejected application of the single incident exception."[24] The sole exception, *Brown v. Bryan County*, involved a failure to train a neophyte on the constitutional limits to the use of force.[25] The *Brown* court focused on the decision by the sheriff to place his nephew, a completely

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[23] *City of Canton*, 489 U.S. at 390 n.10.

[24] *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000); *see also Cozzo v. Tangipahoa Parish Council—President Government*, 279 F.3d 273, 288 (5th Cir. 2002) ("[T]his court has often rejected application of the single incident exception."); *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) ("[P]roof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training.").

[25] 219 F.3d 450 (5th Cir. 2000) (hereinafter, *Brown*). The facts of *Brown* demonstrate that single violation liability applies only in extreme circumstances. The offending officer had been on the job for only a few weeks and had no education or experience whatsoever in law enforcement. Moreover, shortly before joining the sheriff's office, he had been arrested for several crimes, including assault and battery. In contrast, the assistant district attorneys involved in Thompson's armed robbery case had three years of legal schooling, prosecutorial experience, and no history of past misconduct.

untrained new deputy, "on the street to make arrests."[26] Within a matter of weeks, the deputy unconstitutionally injured a citizen he was trying to arrest. This court concluded, based on an extensive list of factors, that "the jury reasonably could have concluded that Sheriff Moore made a *conscious* decision not to train [his nephew], yet still allowed him to make arrests."[27] There was "unmistakable culpability and clearly connected causation" sufficient to hold the municipality liable.[28]

In *Brown*, the conscious decision was to not train a specific deputy, and the excessive use of force—which was the "highly predictable consequence" of failing to train the deputy—occurred soon after the officer went out on the streets. Several panels of this court, however, have reviewed cases where a decision not to train was made long before the alleged violation, and found that the lack of any similar violations indicates that a violation could not be the "highly predictable consequence" of failing to train.[29] This approach

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[26] *Id.* at 458.

[27] *Id.* (emphasis added); *see id.* (listing seven specific factors that put the sheriff on notice that more training was needed).

[28] *Id.* at 461. *Brown* said that "the evidence must withstand a vigorous test" for single violation liability to attach: (1) "it [must] have been obvious to [the policymaker] that the highly predictable consequence of not training" would be a constitutional violation, and (2) "this failure to train" must have been "'the moving force' that had a specific causal connection to the constitutional injury." *Id.*

[29] *See Rios v. City of Del Rio*, 444 F.3d 417, 427 (5th Cir. 2006) ("Here there is *no* allegation of *any* prior incident in which [a

reflects common sense: if there have been thousands of opportunities for municipal employees to violate citizens' constitutional rights, and yet there have been no previous violations, then the need for training is simply not "so obvious."[30]

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similar violation occurred]."); *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 310 (5th Cir. 2004) (finding that "no similar incident had occurred in . . . ten years on the job" and that the evidence showed that officers generally followed the law); *Cozzo*, 279 F.3d at 288 ("[T]he elapsing of almost two decades without any [similar constitutional] complaint being lodged suggests that the inadequate training was not obvious and obviously likely to result in a constitutional violation." (quotation omitted)); *Conner v. Travis County*, 209 F.3d 794, 797 (5th Cir. 2000) ("We can reasonably expect—if the need for training in this area was 'so obvious' and the failure to train was 'so likely to result in the violation of constitutional rights'—that the [Plaintiffs] would be able to identify other instances of harm arising from the failure to train. The fact that they did not do so undercuts their deliberate indifference claim.").

[30] Of course, there will be situations in which we would not expect to see a pattern of violations. One example would be where the Supreme Court develops a new duty. *See Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) (focusing on the fact that *Brady* had been decided only seven years prior to the alleged violation). Another example would be where a municipality changes its policies or makes an exception to its general policies in deliberately choosing not to train an individual. *See Brown*, 219 F.3d at 458 & n.10 (finding that while no "formal policy of training" existed, the record indicated that the municipality hired only "trained and experienced" employees, though it had not adhered to that policy for the employee at issue). In the normal case, however, if there is a failure to train, we should expect to see a pattern of constitutional violations. If no such pattern can be shown, and no reason is given why a pattern does not exist, then the need for training simply is not "so obvious" as to amount to "deliberate indifference."

B. Heightened Causation: *Moving Force*

To safeguard the boundaries established in *Monell*, the Supreme Court has made clear that in addition to a heightened standard of culpability, plaintiffs must meet a heightened standard of causation in order to hold a municipality liable under § 1983.[31] A § 1983 plaintiff must prove that the municipal entity's custom or policy—in this case the failure to train—was the "moving force" that caused the specific constitutional violation; stated differently, the plaintiff must establish a "direct causal link" between the municipal policy and the constitutional injury.[32] We have said that the "connection must be more than a mere 'but for' coupling between cause and effect."[33] The deficiency in training must be the actual cause of the constitutional violation.

Accordingly, the District Attorney must not be held liable simply because the culpable assistant district attorneys worked for him. "[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue."[34]

That this heightened standard is vital to maintaining *Monell*'s prohibition against vicarious liability in § 1983 cases has been clearly expressed by the Supreme Court:

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[31] *City of Canton*, 489 U.S. at 391–92.

[32] *Bryan County*, 520 U.S. at 404.

[33] *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992).

[34] *City of Canton*, 489 U.S. at 385.

> Where a court fails to adhere to rigorous requirements of . . . causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate action* attributable to the municipality *directly caused* a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns . . . .[35]

And in *City of Canton*, the Supreme Court further said:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. *See Oklahoma City v. Tuttle*, 471 U.S., at 823 (opinion of Rehnquist, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto *respondeat superior* liability on municipalities—a result we rejected in *Monell*, 436 U.S., at 693–694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is

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[35] *Bryan County*, 520 U.S. at 415 (emphases added).

> an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism.[36]

This exacting standard is even more crucial in cases where the municipal policy is said to be a failure to train. Because such a "policy," standing alone, implicates no constitutional violation, the "causal connection between municipal policy and the deprivation of constitutional rights becomes more difficult to discern."[37] Thus, a careful analysis is required to determine "whether a jury reasonably could conclude that the [municipality's] conduct was the *moving force* in bringing about the constitutional violation."[38]

To summarize, the requirements for imposing liability upon a municipality for the individual acts of its employees are demanding. Relaxing these heightened requirements would cause significant harm to the interests underlying this demanding evidentiary principle: "adopt[ing] lesser standards of fault and causation would open municipalities to unprecedented liability," "would result in *de facto respondeat superior* liability," and would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs."[39] Therefore, we can hold

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[36] *City of Canton*, 489 U.S. at 391-92.

[37] *City of Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting).

[38] *Id.* at 268 (emphasis added).

[39] *City of Canton*, 489 U.S. at 391–92.

a municipality liable only where the evidence demonstrates "unmistakable culpability and clearly connected causation" for the unconstitutional conduct of an individual employee.[40]

DISCUSSION

A. Sufficiency of the Evidence—Culpability

The *Brady* violation here was a failure of one or more of the four assistant district attorneys involved with Thompson's armed robbery prosecution to turn over the crime lab report to Thompson's counsel.[41] It is undisputed that the District Attorney's Office did not provide formal in-house training regarding

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[40] *Brown*, 219 F.3d at 461.

[41] Before the § 1983 trial, the parties stipulated that the failure to produce the lab report constituted a *Brady* violation. As a stipulated fact, whether this actually constituted a *Brady* violation is not now before the court.

After an extensive review of the record, this is the only *Brady* violation that has been proven to have occurred during Thompson's two trials. Thompson's counsel had access to the evidence lockup, where the physical blood evidence was clearly recorded on the evidence card kept with the evidence. And Thompson's claims of other *Brady* violations during his murder trial lack merit. Some of these claimed violations were examined during Thompson's initial appeals and this court determined that they did not constitute *Brady* violations. *See Thompson v. Cain*, 161 F.3d 802, 805-08 (5th Cir. 1998). Other claimed disclosure violations have never been adjudicated to violate *Brady*.

Other than making conclusory assertions, Judge Prado fails to address any of these other alleged violations in his opinion, or to indicate how non-disclosure of unrelated non-*Brady* material is at all relevant to the need for, or Connick's indifference to, *Brady* training.

Brady.[42] It is also undisputed that the assistant district attorneys were familiar with the general rule of *Brady* that evidence favorable to the accused must be disclosed to the defense.[43] Thompson's burden was to prove that Connick, the policymaker for the Orleans Parish District Attorney's office, was deliberately indifferent to the need to train prosecutors in their *Brady* disclosure obligations.

As this circuit has recently recognized, "it is not enough for [Thompson] to show that the [District Attorney's Office's] training program is, in a general

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[42] The District Attorney's Office stipulated to the fact that no prosecutor remembered any formalized training on their *Brady* responsibilities.

[43] The rule of *Brady* was directly written into the Louisiana Code of Professional Responsibility:

> With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

Articles of Incorporation of the La. State Bar Assoc., art. 16, EC 7-13 (1971); *see also* 21A LA. REV. STAT. 213 (1974). And the American Bar Association included a rule on *Brady* when the Model Rules of Professional Conduct were published in 1983. *See* MRPC R. 3.8(d) (1983) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."). So, in addition to being common knowledge to prosecutors, *Brady* was written into the ethical rules as a duty incumbent upon every prosecutor.

sense, wanting."[44] Instead, "the identified deficiency in a city's training program must be closely related to the ultimate injury."[45] The plaintiff must prove an affirmative to the question: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the *identified respect*?"[46] Every prosecutor understood his general duty under *Brady*, so the identified deficiency was not a failure to train on this general duty, but was instead a failure to train on how to handle specific types of evidence such as the crime lab report at issue.

There was evidence that some prosecutors doubted whether *Brady* itself obligated the production of evidence that was not necessarily exculpatory.[47] This confusion seems to have arisen because the report itself had the potential to be either exculpatory or inculpatory—depending on whether it matched Thompson's blood type.[48] Accepting that there was no training on the *Brady* obligations pertaining to

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[44] *Hinojosa v. Butler*, 547 F.3d 285, 297 (5th Cir. 2008).

[45] *City of Canton*, 489 U.S. at 391.

[46] *Id.* (emphasis added).

[47] This doubt is understandable considering that no court prior to 1985 appears to have addressed the application of *Brady* under these circumstances. *See infra* note 52. The testimony, however, at trial indicated that the District Attorney's own policy was to turn over such scientific reports, irrespective of *Brady*. Consequently, every prosecutor who testified stated that he would have disclosed this crime lab evidence to the defense.

[48] There is no indication that the prosecutors knew Thompson's blood type at the time of his attempted armed robbery trial.

potentially exculpatory crime lab reports, we must determine whether the need for that training was "so obvious" that a reasonable jury could find that Connick was "deliberately indifferent" to that need.

Thompson did not show any pattern of similar *Brady* violations, and instead relies exclusively on this single incident where prosecutors failed to disclose his crime lab report. In another case before this court, we sustained the district court's conclusion that twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) revealed no pattern of *Brady* violations.[49] Connick testified that the District Attorney's Office handled tens of thousands of cases annually around this time, and that in the ten years prior to Thompson's case, only four convictions were overturned based on *Brady* violations, none of which was similar to the violation at issue.[50] So in only a minute number of cases were convictions overturned based on *Brady* violations, and there was not a single instance involving the failure to disclose a crime lab report or other scientific evidence. Connick was not alerted to a need for further *Brady* training—especially not this specific type of

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[49] *See Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003) ("[A] small number of cases [with violations], out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's deliberate indifference to violations of *Brady* rights.").

[50] According to Connick, none of these cases involved the intentional suppression of evidence. In each case, the defense was aware of the existence of the evidence and requested production. The trial court then, in each case, ruled in favor of the State. These rulings, however, were all subsequently overruled by the Louisiana Supreme Court.

Brady training—by previous violations at the District Attorney's Office.[51]

Nor has Thompson been able to refer us to a single reported opinion, issued before this 1985 prosecution, from the Supreme Court, any of the circuit or district courts, or any state court that involved a similar *Brady* violation and thus might have alerted Connick to the need for *Brady* training in this area.[52]

Thompson instead points to the following as substantial evidence that the need for training in this area was "so obvious" that a failure to train constituted deliberate indifference. First, Thompson argues that Connick testified that he knew his prosecutors would frequently come into contact with *Brady* evidence. Second, many prosecutors testified that the law regarding *Brady* contains "gray areas." Third, Thompson noted that several of the assistant district attorneys were only a few years out of law school. Thompson also points to intra-office

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[51] Judge Prado would refute this evidence with testimony from Connick that it was possible that *Brady* violations may have occurred in other cases. Yet Thompson bore the burden of proving Connick's *deliberate indifference*; showing the mere possibility that other violations may have occurred is *not* enough to show that Connick was put on notice that additional training was required, let alone prove that the training was obviously necessary.

[52] The only case pointed to as similar is a Tenth Circuit case decided in 1995, a decade after Thompson's trial, which held that physical evidence that may have had exonerating blood on it should have been disclosed. *See Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801 (10th Cir. 1995). This is the *only* case even arguably on point decided since *Brady* was issued in 1963.

discussions and opinions of various assistant district attorneys from 1999 and later about whether the lab report was evidence covered by *Brady*.

This type of evidence amounts to no more than general observations that would apply to any area of law and any number of district attorney's offices throughout the country. All district attorneys know that *Brady* issues—along with many other areas of constitutional law—are routine matters that their assistants handle every day. Every district attorney knows that nearly all issues he deals with are shaded with "gray areas," whether they concern *Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more.[53] Incorrect prosecutorial decisions in any of these areas may lead to later reversal of convictions. Nearly all district attorney's offices employ prosecutors only a few years out of law school. That there were different opinions about *Brady* evidence, or any other issue that may be raised among lawyers, should surprise no one. All of this evidence involves generic generalizations—not the type of exacting evidence required to show that Connick and the District Attorney's Office were deliberately indifferent to an obvious need to further train its professional prosecutors. To the extent that this evidence could be used to show that the municipality's training was, in a general sense, wanting, similar evidence could also support a deliberate indifference finding against any

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[53] While we might often wish for simple-to-apply, bright-line rules, they are the exception rather than the norm, especially within our constitutional jurisprudence.

prosecutor's office for nearly any error that leads to a reversal of a conviction.

We cannot accept the argument that generalized failure to train evidence sustains a finding of official deliberate indifference. In *Pineda v. City of Houston*,[54] Judge Higginbotham squarely rejected a plaintiff's argument that "'because the City has admitted that specialized training is required for officers in such situations [specialized narcotics investigations], there is sufficient evidence that the training was inadequate.' . . . No butterfly will emerge from this hollow chrysalis of an argument."[55]

Pineda relies on *City of Canton*, which displayed utmost caution toward generalized failure to train evidence:

> Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. *And plainly, adequately trained officers occasionally make mistakes; the fact that they do*

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[54] 291 F.3d 325 (5th Cir. 2002).

[55] *Id.* at 334 n.35.

> *says little about the training program or the legal basis for holding the city liable.*[56]

Because this case concerns the actions of licensed attorneys who have independent professional obligations to know and uphold the law, there is even more reason than in *City of Canton* or *Pineda* not to rely on generalized statements about lack of training. Training is what differentiates attorneys from average public employees. A public employer is entitled to assume that attorneys will abide by the standards of the profession, which include both ethical and practical requirements. Thus, prosecutors are personally responsible as professionals to know what *Brady* entails and when to perform legal research to understand the "gray areas."[57] To hold a public employer liable for failing to train professionals in their profession is an awkward theory. By analogy, it is highly unlikely that a municipality could be held liable for failing to train a doctor it employed in diagnostic nuances. Mere nostrums about training in *Brady*, a basic due process principle of criminal procedure, will not suffice.

While Thompson has failed to produce any specific evidence relating to the obvious need for training on the identified deficiency, there is sufficient evidence to show that the need for training in this area was in fact not "so obvious." This situation—with scientific evidence providing a blood type or other indicator of

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[56] *City of Canton*, 489 U.S. at 391 (emphasis added).

[57] *See Cousin*, 325 F.3d at 638 ("[P]rosecutors exercise independent judgment in trying a case, and they have the legal and ethical obligation to comply with *Brady*.").

the perpetrator's identity—occurs every time a crime lab report is prepared and blood or other scientific evidence has not been taken from the defendant. And yet Thompson failed to show any similar failures to disclose crime lab reports from this District Attorney's Office either before his trial or since. The alleged failure to train extended over a long period of time, during which hundreds or thousands of crime lab reports were prepared.

As a matter of probability, if violations were the "highly predictable consequence" of a failure to train, then we would expect to see more than just one violation in hundreds or thousands of cases. Thompson has, as a legal matter, failed to prove that his violation was the "highly predictable consequence" of failing to train prosecutors. This means that the need for training was not "so obvious," and thus that Connick was not "deliberately indifferent" to Thompson's constitutional rights.[58]

Indeed, three witnesses testified that the District Attorney's Office had a policy of disclosing all crime lab reports. Dubelier testified that turning over crime lab reports was "standard operating procedure in the

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[58] As our court held in a similar case: "Because Burge failed to establish the existence of a single prior *Brady* violation, let alone demonstrate a pattern of violations sufficient to demonstrate deliberate indifference on the part of the sheriff, we find that no reasonable jury could have concluded that Sheriff Strain in his official capacity was deliberately indifferent to Burge's right to a fair trial." *Burge*, 336 F.3d at 373.

office."[59] Williams testified that "[y]ou have to turn over any scientific evidence that you have." And Assistant District Attorney Val Solino testified that turning over crime lab reports was "the policy in the office."[60] While there was some confusion as to *Brady* obligations, every single witness who was asked stated that they would have disclosed the crime lab report had they known about it. This testimony was uncontradicted and unimpeached.[61] Because the

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[59] Dubelier testified that: "If this report was not turned over, I didn't see it." He stated that: "I prosecuted thousands of cases when I was a DA and turned over thousands of these types of reports. If I had the report, I would have turned it over." Dubelier continued by stating that it was standard procedure to disclose crime lab reports: "[W]e were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office. There are, again, records, I am sure, in the office of hundreds, if maybe not more cases where I turned over these type of reports. So my practice would have been to turn over the report."

[60] Solino was the Federal Rule of Civil Procedure 30(b)(6) representative in this case for the District Attorney's Office. He was not employed in Connick's office at the time of the Thompson attempted armed robbery trial. Solino testified that "I would have expected a prosecutor to turn that lab report over, period. That's what I would have done and that's what I would [have] expected them to have done under the policy in the office as I understood it at the time."

[61] *See Reeves*, 530 U.S. at 150–51. Judge Prado states that this evidence of a policy of disclosing scientific reports is contradicted by uncertainty about whether the report at issue was *Brady* material. But evidence of an open-file policy would not be contradicted by uncertainty over whether any particular piece of the file was *Brady* material. In fact, many District Attorney's Offices have blanket disclosure policies specifically so that prosecutors need not make difficult *Brady* decisions. Judge Prado

District Attorney's Office had a policy of disclosing all crime lab reports, there was no need to train on the specifics of which reports would or would not be covered by *Brady*. Just as a municipal policymaker could not be found deliberately indifferent to citizens' *Brady* rights if the policymaker established clear policies—such as an open-file policy—to protect those rights, Connick cannot be considered "deliberately indifferent" to a *Brady* violation based on a failure to disclose a crime lab report when his employees generally understood that they had to disclose exactly those types of reports.

For these reasons, under *Monell*, *City of Canton*, and *Bryan County*, the evidence in this record does not support the conclusion that Connick was deliberately indifferent to an obvious need for training. Consequently, the District Attorney cannot be held liable for the failure by his employees to disclose this crime lab report.

B. Sufficiency of the Evidence—Causation

Nor does the diffuse evidence of *Brady* misunderstanding among several assistant district attorneys satisfy the causation requirements relating to the violation at issue here. The specific question we

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then goes on to state that this evidence is contradicted by evidence of a policy not to disclose certain police reports and witness statements. But there is nothing contradictory in having a policy to disclose one type of report alongside a policy not to disclose an entirely different type of report. Judge Prado is contradicting apples with oranges; there is simply no evidence in the record which refutes the testimony of these witnesses that there was a policy of disclosing *lab* reports and *scientific* evidence.

ask is whether Connick's failure to provide in-house training was the moving force behind the failure to turn over the lab report. Stated differently, the question is whether, under the teachings of *City of Canton* and *Bryan County*, unfamiliarity with *Brady* obligations with respect to this lab report was the *actual cause*—the *moving force*—of this constitutional violation. This standard of causation must be established by substantial evidence. If Thompson did not submit substantial evidence that the failure to produce the lab report was caused by confusion over *Brady*, the jury could not have reasonably concluded that the lack of training was the direct cause of Thompson's injury, and judgment as a matter of law is required.

The record leaves many unanswered questions about the actual cause of this constitutional violation. It is, however, clear that four assistant district attorneys were involved in the failure to produce the lab report. They were Bruce Whittaker, James Williams, Gerry Deegan, and Eric Dubelier. The failure to produce the lab report lies with one or more of these assistant district attorneys. We turn now to examine what the record reflects as to these assistants.

Whittaker, as the armed robbery "screener," was responsible for initially reviewing the police file on Thompson, deciding whether to prosecute, and assigning the case to the correct division. He "screened" Thompson's file on February 25, 1985—approximately five weeks after Thompson had been arrested. The police report indicated that evidence had been collected from the crime scene that possibly contained the perpetrator's blood.

Accordingly, Whittaker wrote "May wish to do blood tests," on the screening action form.

After Whittaker screened the case, Dubelier, an experienced assistant district attorney, was assigned as lead prosecutor, and Deegan was assigned as the junior assistant on the case. Dubelier had no independent recollection of the armed robbery prosecution that had occurred twenty years earlier, but the record indicates that he and Deegan handled most of the pre-trial work. Williams did not become involved with the case until March 11 when Dubelier asked him to handle a pre-trial evidentiary hearing. During this hearing, Williams, based on his review of the screening action form, announced to the court and Thompson's counsel that the prosecution intended to test Thompson's blood. However, no such test was ever ordered by the prosecution. Later, sometime before the April 11 trial,[62] Dubelier asked Williams to take over trial responsibility for the case.

There is no testimony in the record from Deegan, who died several years before Thompson instituted this action. The record does contain, however, an affidavit and testimony from his colleague and close friend Michael Riehlmann. According to Riehlmann, shortly after Deegan was diagnosed with terminal cancer, Deegan confessed "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the

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[62] Williams testified that Dubelier asked him to take over the case just a few days before trial. Dubelier, however, could not recall when he asked Williams to take over, and he testified that it would have been very odd to make such a change only a few days before trial.

defendant."[63] Deegan's confession is, in part, supported by the evidence card, a card on file that identified the physical evidence in the case. The card indicates that the morning the trial was set to begin, Deegan checked out the blood evidence and never returned it.

As for the lab report itself, the record is not clear who ordered the testing. The report was dated April 9, just two days before trial, and addressed to Whittaker. Whittaker recalled seeing the report and placing it on Williams's desk. Because he was only the screening prosecutor, Whittaker was not responsible for turning it over to the defense. Williams and Dubelier both testified that they never saw the report. Riehlmann's account of Deegan's confession is not clear whether Deegan was referring to the lab report, to the actual blood evidence, or to both.

The statements of these four assistant district attorneys—the only prosecutors who had any involvement in the armed robbery case—provide very little information regarding the lab report. What is clear from the record is this: first, Whittaker received the report a few days before trial; second, no prosecutor ever turned it over to Thompson's counsel; and third, the report did not appear again until it was discovered fourteen years later.

Thompson based his case upon a single causation theory: that one or more of the assistant district

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[63] At trial, Riehlmann's testimony was more equivocal: he stated that Deegan told him "that he had failed to turn over stuff that might have been exculpatory."

attorneys involved in Thompson's prosecution decided not to turn over the report because they did not know that they were legally obligated to produce it and that training sessions on *Brady* would have avoided this incident.[64] To prove his theory, Thompson must present substantial evidence from which a jury reasonably could conclude that the failure of Connick to provide training sessions on *Brady* was the *actual cause* of and the *moving force* behind the failure to produce the report. The precedents require substantial evidence of direct causation. This standard demands more than evidence of confusion over *Brady*'s "gray areas" in the District Attorney's Office. Finally, Thompson must establish that this lack of understanding would have been remedied by an in-house training program.

Thompson's brief fails to point out any such evidence to sustain municipal liability. As best we understand his brief, the only arguments he makes regarding causation are these: (1) the record supports the conclusion that these four prosecutors knew about the blood evidence and yet failed to disclose it;[65] and

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[64] Yet, we must observe that the record does not reflect whether a decision to produce, or not produce, the report was ever made, or whether the report was misplaced or overlooked, or whether one or more of the four prosecutors assumed it would be handled by someone else.

[65] For example, Thompson's brief states, "It is also not surprising that at least four prosecutors—Dubelier, Williams, Whittaker, and Deegan—knew about the blood evidence yet each failed to disclose it." And, "Dubelier, the special prosecutor in charge of both cases, knew but chose not to reveal there was blood evidence." And, "Based upon that evidence, the jury was free to infer that both

(2) the jury was free to reject Connick's theory of a single rogue prosecutor. Even if we accept both of these assertions as correct, they still fail completely to establish that the *Brady* violation was caused by unfamiliarity with *Brady*. And because Thompson bore the burden of proof, he had to do more than simply assert that the jury was free to reject Connick's explanations for the violation. Thompson had to put forth substantial evidence supporting his own theory of causation: that the assistant district attorney (or attorneys) responsible for the constitutional violation did not understand *Brady*, that this lack of understanding caused the failure to produce the report, and that *Brady* training could have resolved this lack of understanding.

We have reviewed the record for any such evidence. First, it contains evidence that Williams, when asked if *Brady* material includes documents that could be used to impeach a government witness, incorrectly replied "No."[66] Second, the 1987 policy manual from the District Attorney's Office could be read to imply that *Brady* evidence need only be produced when the defense requests it and it fails to note that impeachment evidence is also included under *Brady*. Third, Solino and Connick, after the report was discovered, contended that the lab report was not subject to *Brady* as such because Thompson's blood type was unknown and the report thus had no

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Whittaker and Williams received the crime lab report, but did not produce it."

[66] *See Giglio v. United States*, 405 U.S. 150 (1972) (holding that *Brady* requires the production of evidence that could be used to impeach a government witness).

exonerative effect on Thompson's guilt. Fourth, although Williams stated unequivocally that *all* technical or scientific reports, like the lab report, were required to be turned over to a defendant, he also testified that this obligation did not necessarily arise from *Brady* because the report was not necessarily exculpatory.[67]

The record fails to establish, by substantial evidence, that the actual cause and moving force behind the constitutional violation of not producing the lab report was the failure of the District Attorney to have in-house training sessions on *Brady*. For example, an assistant district attorney's confusion regarding whether *Brady* applied to impeachment evidence may show a need for enlightening this assistant but is irrelevant here because the lab report clearly was not impeachment evidence and would not

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[67] Thompson seeks to bolster the evidence of a link between the lack of formal *Brady* training and non-disclosure of the lab report with evidence of other allegedly illegal failures by the prosecutors to turn over evidence to his counsel in the murder case. This attempt fails for several reason. First, as has been noted, *supra* n.41, none of the other non-disclosures has been held to violate *Brady*—or any other legal rule. It is a non-sequitur to say that failure to train on *Brady* had anything to do with failure to disclose non-*Brady* evidence. Second, without proof of the illegality of the nondisclosures, Thompson cannot rely on them to prove systemic lack of training about *Brady* obligations. Third, the more general notion of a "culture of indifference" toward a district attorney's disclosure obligations is a description rather than a legal rule. It has no support in caselaw and is inconsistent with the lack of pattern evidence in this case. Finally, if there was or could be municipal culpability founded on a "culture of indifference" to *Brady* violations, it speaks to the District Attorney's policy—but the jury rejected Thompson's unconstitutional policy theory!

have been turned over on that basis. The policy manual, although incomplete in its instructions on *Brady* evidence and post-dating Thompson's trial by several years, does little to establish the necessary direct causal link, and the jury concluded in its verdict that the violation was not due to an established municipal policy.

Thus, even assuming that Connick was deliberately indifferent to a need for training, Thompson failed as a matter of law to show that the lack of training was the actual cause of the constitutional violation.[68] Therefore the judgment should be reversed and rendered for the defendant.

C. Jury Instructions

The jury was probably misled in its decision by the district court's plainly erroneous jury instructions. After several hours of deliberations, the jury sent out a single question:

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[68] Judge Prado states that we have ignored evidence about causation. But a careful review of the panel opinion reveals that while Judge Prado discusses extensively how the jury was free to reject Connick's alternative arguments, he fails to point to substantial evidence from which the jury could conclude that a failure to train was the moving force behind this violation. Considering the record as a whole, as we must, and keeping in mind that Thompson bore the burden of showing such substantial evidence, we conclude that Thompson has failed to present sufficient evidence for any reasonable jury to conclude that Connick's deliberate indifference was the moving force behind this *Brady* violation.

> What does "Deliberate" Indifference mean? Does it mean intentional or would "Failure to monitor" be considered Deliberate?

The district court responded that:

> "Deliberate Indifference" does not necessarily mean intentional, but does require more than mere negilgence [sic] or even gross negligence.[69]

The district court's answer lacked "concrete accuracy,"[70] and instead defined deliberate indifference as something less than intent but more than negligence—a nebulous answer that failed to sufficiently inform the jury of the controlling law.[71] Nor was there any clarification in the original jury instructions, which failed to state that municipal liability requires a "conscious" or "deliberate" choice on the part of the policymaker.

By failing to clearly define "deliberate indifference," the instructions were confusing and misleading. The

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[69] Nowhere did the district court give the legal definitions for "negligence" or "gross negligence." So while this instruction provides as least some minor guidance to the trained legal mind, it provides extraordinarily little clarity to the average juror.

[70] *United States v. Stevens*, 38 F.3d 167, 169–70 (5th Cir. 1994) ("When a deliberating jury expresses confusion and difficulty over an issue submitted to it, the trial court's task is to clear that confusion away with concrete accuracy." (quotation omitted)).

[71] Even Judge Prado's arguments and selective quotations, while not fully reflecting the case law of either the Supreme Court or this circuit, would have provided greater guidance to this uncertain jury than the answer given by the district court.

instructions erroneously omitted the clear and obvious requirement laid down by the Supreme Court in *City of Canton* that "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983."[72] This en banc court has previously held that deliberate indifference is a "lesser form of intent."[73] The district court failed in its duty to incorporate these governing rulings when it issued jury instructions.

Although the plain error standard limits appellate review here because no proper objection was made to the instructions, we believe that standard was met.[74] The district court's failure to correctly instruct the jury was clearly and obviously inconsistent with the law, and this error affected the Defendant's substantial

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[72] 489 U.S. at 389 (internal quotation omitted). *See also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality) ("[T]he word 'policy' generally implies a course of action *consciously* chosen from among various alternatives; . . . evidence [must] be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers *deliberately* chose a training program which would prove inadequate." (emphasis added)); *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005) ("[A] showing of deliberate indifference requires that the Plaintiffs show that the failure to train reflects a 'deliberate' or 'conscious' choice to endanger constitutional rights." (quotation omitted)).

[73] *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (en banc).

[74] *See Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009); *see also Wright v. Ford Motor Co.*, 508 F.3d 263, 272 (5th Cir. 2007).

rights by allowing liability without any actual municipal "culpability."

Finally, plain error is to be corrected if the "error seriously affects the fairness, integrity or public reputation of judicial proceedings."[75] "The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions."[76] As noted above, the Supreme Court has specifically warned that reducing the standards of fault in municipal liability cases would "impose *de facto respondeat superior* liability" and raise "serious questions of federalism."[77] Correctly instructing the jury on the applicable standard of fault is particularly important in municipal liability cases which involve the public purses of our cities and local governments. In this case, nebulous jury instructions authorized a verdict manifestly unfair to these Defendants and plainly inconsistent with the Supreme Court's and our relevant precedent. The verdict also undermines the will of Congress expressed in § 1983.[78]

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[75] *Puckett*, 129 S. Ct. at 1429 (quotation and alteration omitted).

[76] *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009).

[77] *See City of Canton*, 489 U.S. at 392; *see supra notes* 35–36 and accompanying text.

[78] *See Bryan County*, 520 U.S. at 400 ("[I]n enacting § 1983, Congress did not intend to impose liability on a municipality unless *deliberate* action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights.").

We urge this point in further explanation of this unjustifiable verdict and to discourage other district courts from making similar mistakes.

CONCLUSION

Judgment as a matter of law "is a method for protecting neutral principles of law from powerful forces outside the scope of law—compassion and prejudice."[79] We fully appreciate that Thompson has suffered a horrible wrong inflicted by agents of the government and that in many cases the principal would be responsible for the acts of these agents. But as Judge Wisdom counseled when overturning a jury verdict, "[i]n reviewing [a] . . . case when the plaintiff has been injured grievously, hard as our sympathies may pull us, our duty to maintain the integrity of substantive law pulls harder."[80] The Supreme Court has stated clearly and emphatically that the liability of municipalities is limited to cases where a municipal action caused the constitutional violation. The plaintiff must show the "requisite degree of culpability" on the part of the municipality—deliberate indifference to an obvious need for training—and must

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[79] *Rutherford v. Ill. Cent. R.R. Co.*, 278 F.2d 310, 312 (5th Cir. 1960).

[80] *Turner v. Atl. Coast Line R.R. Co.*, 292 F.2d 586, 589 (5th Cir. 1961). Judge Prado rightly puts great faith in the Seventh Amendment right to a jury trial. But we also have a duty to maintain the integrity of our substantive law. Regrettably, Judge Prado has chosen not to engage with many of these arguments, or with the substantive law more generally, despite the Supreme Court's clear warnings that we must preserve the heightened evidentiary standards of municipal liability. *See supra* notes 35–36 and accompanying text.

demonstrate a "direct causal link" between the failure to train and the constitutional violation.[81]

Thompson failed to produce substantial evidence to support his claim that the District Attorney was deliberately indifferent to an obvious need for training of his staff. And he failed to produce adequate evidence of causation to show that the failure to train was the actual cause and moving force behind the failure to produce the lab report. Thompson has, in short, failed to meet the heightened standards for culpability and causation imposed by *Monell*, *City of Canton*, and *Bryan County*, and we would therefore reverse the district court's judgment.

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[81] *Bryan County*, 520 U.S. at 404.

PRADO, Circuit Judge, with whom KING, WIENER, STEWART, and ELROD, Circuit Judges, join:

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942).

The panel opinion thoroughly explains why the evidence the jury heard in this case is sufficient to support its verdict. *See Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008). Judge Clement's dissent ("the dissent") to this court's order affirming based on a tie en banc vote, however, overlooks much of the evidence the jury heard and ignores the standard of review that we apply to jury verdicts.

By reading the dissent, one would be hard pressed to even realize that a *jury* rendered the verdict in this case. At the outset, the dissent attempts to explain the standard of review but fails to acknowledge the deference we must accord to a jury's verdict. We have repeatedly admonished that

> our standard of review with respect to a jury verdict is especially deferential. As such, judgment as a matter of law should not be granted unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.

Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001) (internal quotation marks and citations omitted). "A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296-97 (5th Cir. 2005) (internal quotation marks omitted). We must view the evidence the jury heard with this deferential standard in mind.

A review of the *full* record—as laid out in the panel opinion—reveals that the dissent is merely quibbling with the jury's factual findings. *See Thompson*, 553 F.3d at 843-46. This oversteps our bounds as an appellate court. The dissent presents nothing more than a skewed version of the facts in favor of the District Attorney's Office. Its approach is directly contrary to the rule that we must view all evidence and draw all reasonable inferences in favor of the jury's verdict. *See United States v. Miles*, 360 F.3d 472, 476-77 (5th Cir. 2004); *Am. Cas. Co. of Reading, Pa. v. Myrick*, 304 F.2d 179, 182 (5th Cir. 1962) ("[I]n reviewing a jury's verdict a court may not substitute its judgment on the facts for the jury's determination simply because inconsistent and uncertain inferences are equally supported by the proof."). The dissent thus ignores the maxim that the jury is allowed to accept or reject competing evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (noting that in reviewing a jury's verdict an appellate court "may not make credibility determinations or weigh the evidence").

For example, the dissent states that evidence regarding whether Connick had a policy to disclose crime lab reports was "uncontradicted and

unimpeached." *See* dissent at 25-26. However, ADA James Williams testified that he did *not* have a *Brady* duty to disclose crime scene technician reports and *equivocated* regarding the disclosure of blood reports if he did not know the perpetrator's blood type, which is the exact situation he faced when prosecuting Thompson. R. at 2353-54 (suggesting that the crime lab report was not *Brady* material "because I didn't know what the blood type of Mr. Thompson was, and I didn't know what the blood type of Mr. LaGarde [the victim of the robbery] was"). Similarly, Williams explained that Connick had a policy *not* to disclose certain police reports and witness statements, contradicting his testimony that he had to turn over all written reports generated in a case. *Compare* R. at 2027, *with* R. at 2354. Val Solino, the DA's Office's official Rule 30(b)(6) representative, stated that under Connick's *Brady* policy, even as later memorialized in a 1987 manual, an ADA in Connick's office would *not* have had to produce a crime lab report if he did not know the defendant's blood type. R. at 2874-75. As another example, the dissent minimizes the evidence the jury heard regarding the District Attorney's other *Brady* violations in this and other cases. The dissent manages to highlight Connick's testimony that the Louisiana Supreme Court had overturned only four convictions based on a *Brady* violation during his tenure as District Attorney, but fails to acknowledge Connick's concession that because most *Brady* violations typically do not lead to published opinions, *Brady* violations had likely occurred in other cases as well. R. at 2823-25. Similarly, by discounting the numerous other examples of nondisclosure that occurred *in this case* (in addition to the nondisclosure of the crime lab report)—examples that Thompson presented to the jury without objection—the dissent

ignores the fact that the jury could consider these other events[1] as further proof of the need for and Connick's indifference to training on *Brady*.

In another attempt to overturn the jury's verdict, the dissent simply ignores evidence about causation. As discussed fully in the panel opinion, the evidence permitted the jury to find that Connick's deliberate indifference caused the *Brady* violations in this case. *See Thompson*, 553 F.3d at 853-57. Thus, the only way the dissent can reach its desired result is by departing from our deferential standard, reading the record selectively to support its position, and substituting its own judgment for that of the jury's.

Finally, the dissent acknowledges that Connick did not preserve his objection to the jury instructions but still attempts to support a conclusion that the district court plainly erred in its instruction on deliberate indifference. As the panel opinion explains, however, the district court's instructions were legally correct—and certainly not so "clearly" or "obviously" wrong as to constitute plain error. *See Thompson*, 554 F.3d at 859-63.

Deliberate indifference and intent are not synonymous. They are instead separate, albeit

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[1] These other examples included, inter alia, the nondisclosure of eyewitness statements. As this case evidences, many *Brady* violations are not uncovered until years after the event, if they are ever uncovered. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court concluded that the nondisclosure of similar eyewitness statements by this very office within a year prior to Thompson's first murder trial violated *Brady*. These statements did not come to light until five years after Kyles's trial.

sometimes legally equivalent, concepts. *See Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 419 (1997) ("Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes."). One need not show actual intent for a jury to find liability under the deliberate indifference standard. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court clarified that the fact-finder can *infer* deliberate indifference "from the fact that the risk of harm is obvious." *Id.* at 738 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)); *see also Farmer*, 511 U.S. at 841 (noting that the test from *City of Canton v. Harris*, 489 U.S. 378 (1989), for deliberate indifference is an "objective standard"). This court also has stated that deliberate indifference is "a *lesser* form of intent." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (internal quotation marks omitted) (emphasis added). A finding of deliberate indifference is thus tantamount to a finding of intent in the context of municipal liability, but a finding of deliberate indifference does not *require* a finding of intent—which is exactly what the district court instructed the jury in light of this precedent. *See Thompson*, 553 F.3d at 859-63. The dissent improperly adds this intent element, thereby recasting the meaning of deliberate indifference so as to assign error to the district court.

At bottom, the dissent seeks to retry this case through the appellate process. This approach abdicates this court's duty to uphold a jury's verdict unless the facts point so strongly in Connick's favor that *no* reasonable jury could rule to the contrary. *See*

Flowers, 247 F.3d at 235. Indeed, the fact that reasonable judges on this court view the evidence differently suggests that these factual disputes were for the jury to resolve. As the extensive discussion in the panel opinion demonstrates, there was ample evidence to allow the citizens of this New Orleans jury to find for Thompson. Of course, this is an extraordinary case with extraordinary facts. Allowing this judgment to stand will not subject municipalities to widespread liability, as a holding that the need for training was "so obvious" and the lack of training "so likely" to create a constitutional violation will apply only in the rare instance. This is that rare case. The jury heard substantial evidence that the District Attorney's Office provided *no Brady*-specific training, despite the known risk of the exact type of systemic nondisclosure that the failure to train caused here. Acknowledging the proper standard of review and viewing the jury's verdict in the correct deferential light compels us to uphold the jury's decision.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-30443

[Filed December 19, 2008]

Charles R. Fulbruge III Clerk

JOHN THOMPSON Plaintiff-Appellee v. HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE Defendants-Appellants	)

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, STEWART, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that due process requires the prosecution in a criminal case to turn over evidence that is favorable to the accused when the evidence is material to guilt or punishment. The Supreme Court later expanded the *Brady* rule to require the disclosure of evidence that is relevant to the credibility of key government witnesses. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). In the criminal proceedings that prompted this lawsuit, it is undisputed that *Brady* evidence was not turned over to the defense. As a result, Plaintiff-Appellee John Thompson ("Thompson") was convicted of an attempted armed robbery of which he was actually innocent. Attorneys in the Orleans Parish District Attorney's Office ("the DA's Office") then used the attempted armed robbery conviction to help secure a conviction and death sentence for Thompson in an unrelated murder case. Eighteen years later—and one month before his scheduled execution—Thompson's investigators uncovered the exculpatory evidence that indisputably cleared Thompson of the armed robbery charge. Thompson was then retried for the murder and found not guilty.

Thompson now seeks damages for the eighteen years he spent in prison, fourteen of which were in solitary confinement on death row. After a jury trial lasting several days, the jury determined that the DA's Office was deliberately indifferent to the need to train, monitor, and supervise its attorneys on *Brady* principles. The jury awarded Thompson $14 million in damages, and the district court added approximately $1 million in attorneys' fees. Defendants challenge that result on multiple grounds. Finding no reversible error for the majority of Defendants' arguments, we AFFIRM in large part. Because the district court erroneously included non-liable defendants in the judgment, we REVERSE in part and REMAND with instructions to remove those defendants from the judgment.

I. FACTUAL BACKGROUND

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. Because Liuzza was the son of a prominent executive, the murder received a lot of attention in the community. Approximately three weeks later, on December 28, 1984, siblings Jay, Marie, and Michael LaGarde were the victims of an armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the scuffle, some of the perpetrator's blood ended up on the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the perpetrator's blood on it.

On January 17, 1985, Thompson and Kevin Freeman ("Freeman") were arrested and charged with the Liuzza murder. As a result, Thompson's picture

was published in the New Orleans Times-Picayune. The LaGardes' father showed his children the picture, and they believed that Thompson was the individual who had attempted to rob them. They contacted the DA's Office and identified Thompson as the armed robber.

The LaGardes' armed robbery case was then screened by assistant district attorney Bruce Whittaker ("Whittaker") as part of the case handling process that then-District Attorney Harry F. Connick ("Connick") instituted. Screening was designed to identify the cases in which charges should be brought and those in which no further action should be taken. The screening process would begin when the New Orleans police department made an arrest. The police department would then send a police report to the DA's Office where it was reviewed by an assistant district attorney (the screener) who determined whether a case could be made against the alleged perpetrator. The screener then filled out a Screening Action Form indicating whether charges should be brought and, if appropriate, making suggestions about the way the case should be handled.

With respect to the armed robbery of the LaGardes, Whittaker approved the case for prosecution and, after noting that a crime scene technician had taken a swatch of Jay LaGarde's pants with blood on it, wrote on the Screening Action Form that the government "[m]ay wish to do blood test." Whittaker also indicated that the case should be handled by Eric Dubelier ("Dubelier") as a special prosecutor. Whittaker explained at trial that the case was sent to Dubelier because it involved the same defendant (Thompson) as

the Liuzza murder case, which Dubelier was already handling.

In a strategic move, the district attorneys successfully petitioned the Orleans Parish Criminal District Court to switch the order of the trials so that Thompson would be tried for the armed robbery first. The idea was that a guilty verdict in the armed robbery case would make Thompson unwilling to take the stand in the murder trial (due to the fact that a conviction from the attempted armed robbery trial could be entered into evidence against him, as impeachment, if he testified) and increase the likelihood of the death penalty.

On March 11, 1985, James Williams ("Williams") handled a hearing on behalf of the DA's Office regarding a motion to suppress in the LaGarde armed robbery case.[1] At the conclusion of the hearing, Williams, noting the reference to a blood test on the Screening Action Form, stated in open court that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion—have a criminalist here on the 27th." There is no indication that the DA's Office ever sent anyone to test Thompson's blood.

Approximately one week before the armed robbery trial, the bloody swatch from Jay LaGarde's pants was sent to be tested, although the record does not reveal who ordered the test. Two days before the armed robbery trial, Whittaker received a crime lab report

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[1] Williams explained that he was asked to handle the hearing because Dubelier was unavailable at that time.

that stated that the armed robbery perpetrator's blood type was type B. Whittaker stated that he placed the report on Williams's desk, but Williams claims that he never saw the report. Regardless, the report was never turned over to Thompson.[2] Several days before the armed robbery trial, Dubelier asked Williams to act as lead prosecutor in the case. Therefore, the armed robbery case was tried by Williams and assistant district attorney Gerry Deegan ("Deegan") on April 11 and 12, 1985.

On the first day of trial, Deegan checked all of the armed robbery evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the evidence into the court property room, but never checked in the pants swatch.[3] Williams never mentioned the blood evidence at trial and relied primarily on eyewitness testimony. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison.

Dubelier and Williams then tried Thompson for the Liuzza murder from May 6 to 8, 1985. At the trial, Freeman (the other individual who had been charged with the murder) testified that Thompson shot Liuzza. Roger Perkins ("Perkins"), an acquaintance of

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[2] Thompson's defense counsel had submitted a request for exhibits and scientific evidence that were favorable to Thompson. Dubelier's written reply was "[i]nspection to be permitted." The bloody pant leg was sent to be tested the day after Dubelier's reply was filed.

[3] At minimum, Whittaker, Deegan, and Williams knew about the blood evidence.

Thompson's, testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. There was also testimony by police officer David Carter and eyewitness Paul Schliffka ("Schliffka"). Schliffka described the perpetrator's hair as "short" and as an "afro." Carter testified that, when he first questioned Schliffka, Schliffka described the perpetrator's hair as "black and short, afro style."

Due to his attempted armed robbery conviction, Thompson chose not to testify on his own behalf. Had he testified, the district attorney likely would have entered his attempted armed robbery conviction into evidence against him for purposes of impeachment.[4] The jury convicted Thompson of first-degree murder. During the sentencing phase, Marie LaGarde testified about Thompson's attempt to rob her family and her brother's actions in fighting him off. Dubelier emphasized this testimony in his closing argument, asserting that there easily could have been three more murders and that a death sentence was necessary to punish Thompson because he was already set to spend forty-nine and one-half years in prison for the attempted armed robbery. The jury sentenced Thompson to death.

In the fourteen years after his murder conviction, Thompson exhausted all of his appeals. His execution was set for May 20, 1999, and his attorneys informed him that there were no more options for appeal. Then,

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[4] The criminal district court denied Thompson's motion in limine to prevent the admission of his attempted armed robbery conviction.

in late April 1999, one of Thompson's investigators came across a microfiche copy of the crime lab report containing the blood type of the armed robbery perpetrator. Thompson was tested and found to be blood type O, making it impossible for him to have been the armed robber. Thompson's attorneys presented this information to the DA's Office, which then moved for a stay of execution. In the ensuing investigation, it was uncovered that, in 1994, Deegan confessed to Michael Riehlmann ("Riehlmann"), a former assistant district attorney, that he (Deegan) had intentionally withheld the blood evidence. Deegan made this confession shortly after being told that he had only months to live as the result of cancer. Riehlmann did not tell anyone of the confession until the blood evidence was discovered in 1999.[5]

Thompson further asserts that other *Brady* evidence was not turned over as required. Several police reports containing eyewitness descriptions of the murderer that did not match Thompson's description were not turned over to the defense, despite the defense's request for all police reports containing descriptions inconsistent with Thompson's general appearance. For example, one police report indicated that Schliffka described the perpetrator as having "close-cut hair" and made no reference to an "afro style" haircut. At the time of the murder, Thompson's hair was decidedly "afro style," while Freeman's was "close-cut." Thompson also asserts that the DA's Office did not disclose the fact that Perkins received a

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[5] Riehlmann faced disciplinary proceedings for withholding the information.

monetary award from the Liuzza family for identifying the murderer.

Following the stay of execution, Connick moved to vacate the armed robbery conviction and did not retry Thompson for that crime.[6] Connick also convened a grand jury to investigate the concealment of the blood evidence, but eventually dismissed the grand jury. John Glas ("Glas"), the assistant district attorney who was prosecuting the concealment charges, resigned in protest of the dismissal and testified in the instant case that the evidence supported the charges.

Thompson filed for post-conviction relief on the murder conviction and, in 2001, the criminal district court changed his death sentence to life-in-prison, as the attempted armed robbery conviction had been used as evidence against him during the sentencing phase. The Louisiana Fourth Circuit Court of Appeals reversed Thompson's murder conviction in 2002, finding that the attempted armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at his murder trial. *State v. Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002). The DA's Office retried Thompson for the Liuzza

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[6] In this case, Defendants did not object to the district court's instruction to the jury that as a matter of law the nonproduction of the blood evidence violated Thompson's constitutional rights. The district court based its decision on the Louisiana Fourth Circuit Court of Appeals's finding that "the State's intentional hiding of exculpatory evidence in the armed robbery case led to his improper conviction in that case." *State v. Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002). On appeal, Defendants have not argued that the blood evidence was not exculpatory or that its nondisclosure was not a *Brady* violation.

murder, and, free of the attempted armed robbery conviction, Thompson testified in his own defense. In addition, Thompson was able to use thirteen pieces of evidence that the prosecutors did not turn over during the first murder trial. This evidence included the police and incident reports described above, photographs, statements by Freeman and Perkins, an audiotape of Perkins, and information regarding the monetary award given to Perkins. Sheri Hartman Kelly, Stephen McAlister, and Rosemary Cash McAlister, eyewitnesses who the police had not previously disclosed to Thompson, also testified about the Liuzza murder. Freeman, the DA's Office's key witness in the first murder trial, had been killed during the interval between the first and second trial. However, the state court permitted the DA's Office to read relevant portions of Freeman's testimony in the first trial, and Thompson's lawyers were permitted to state the questions they would have propounded on cross-examination. The jury returned a verdict of not guilty in thirty-five minutes. Thompson was then released from prison, eighteen years after he was initially arrested.

II. PROCEDURAL HISTORY

Thompson filed suit on July 16, 2003, naming as defendants the Orleans Parish District Attorney's Office; Connick, Williams, Dubelier, and Eddie Jordan (the District Attorney in 2003) in their official capacities; and Connick in his individual capacity (collectively, "Defendants"). Thompson brought state law claims for malicious prosecution and intentional or reckless infliction of emotional distress, as well as a claim under 42 U.S.C. § 1983 for wrongful suppression of exculpatory evidence and a conspiracy claim under

42 U.S.C. § 1985(3). The district court granted summary judgment for Defendants on the state law claims on the basis of absolute prosecutorial immunity but permitted the federal claims to go forward.

The parties presented the case to a jury from February 5 to 9, 2007. Prior to the trial, Thompson dismissed the claim against Connick in his individual capacity, and, after Thompson rested, the district court dismissed the § 1985(3) conspiracy claim. At the close of evidence, the district court ruled that Dubelier and Williams were not "policymakers" and, thus, their actions could not create liability on behalf of the DA's Office. It also ruled, and stated in the jury instructions, that the nondisclosure of the blood evidence and the resulting infringement of Thompson's right to testify in the murder trial violated his constitutional rights.[7] Therefore, the arguments of the parties focused on whether the DA's Office had an unconstitutional policy regarding *Brady* evidence and whether the DA's Office adequately trained, monitored, and supervised its attorneys regarding their *Brady* obligations.

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[7] Although instructing the jury that, as a matter of law, the *Brady* violation in the armed robbery trial resulted in a violation of Thompson's right to testify in his murder trial, the district court allowed the jury to consider other violations of Thompson's rights in the murder trial. The court instructed the jury that it may consider other violations as additional evidence of the DA's Office's official policy or deliberate indifference. Defendants did not object to this instruction and, on appeal, take issue with the instruction for the first time in their reply brief. We do not, therefore, consider Defendants' argument. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) ("This Court will not consider a claim raised for the first time in a reply brief.").

Following three and a half days of testimony, the jury was asked the following two questions concerning liability:

> 1. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by an official policy of the District Attorney?
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> * * *
>
> 2. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?

If the jury answered "Yes" to either question, it was instructed to answer a third question regarding damages:

> 3. Please state what sum of money, if any, would reasonably and fairly compensate John Thompson for damages he has actually suffered or is reasonably likely to suffer in the future as a result of the District Attorney's policy or deliberate indifference.

A little more than three hours after the jury recessed to begin deliberations, it sent out a note, which read:

> What does "Deliberate" Indifference mean? Does it mean intentional or would "Failure to monitor" be considered Deliberate?

After discussing the issue with the attorneys, the district court sent in the following response:

> "Deliberate Indifference" does not necessarily mean intentional, but does require more than mere negilgence [sic] or even gross negligence. Please refer to pages 26 + 27 of the legal instructions for further guidance.

The court had originally instructed the jury that to find liability for deliberate indifference under the second question it had to conclude that "[t]he district attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference to the fact that inaction would obviously result in a constitutional violation." Pages 26 and 27 of the jury instructions clarified,

> In order to find that the district attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference, you must find that Mr. Thompson has proved each of the following three things by a preponderance of the evidence:
>
> > First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused.

> Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed.
>
> Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights.

Less than half an hour later, the jury returned its verdict, answering "No" to the first question regarding whether the harm was caused by an official policy. The jury answered "Yes" to the second question regarding whether the harm was caused by a deliberately indifferent failure to establish policies and procedures. The verdict form reflects that at some point the jury checked "No" in response to the second question but had crossed it out and checked "Yes." The jury then awarded Thompson $14 million in damages.[8]

The district court entered a judgment in that amount against Connick, Dubelier, Williams, and Jordan in their official capacities and against the DA's Office "jointly and in solido." Defendants filed a motion for judgment as a matter of law, a motion to amend or alter the judgment, and a motion for a new trial. The district court denied all three motions. The district court granted Thompson's motion for

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[8] Liability in this case was thus predicated on the district attorney's failure to train, monitor, or supervise. In this opinion, however, we use the term "failure to train" to encompass all three bases for liability because the parties have framed the issues on appeal in those terms.

attorneys' fees and awarded him $1,031,841.79, entering a separate judgment to that effect. Defendants appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291, as a final judgment has been entered.

III. DISCUSSION

A. Statute of Limitations

On appeal, Defendants first argue that the district court erred in denying their motion for summary judgment on the issue of whether the statute of limitations barred Thompson's claim of a *Brady* violation in the armed robbery trial for the nondisclosure of blood evidence. The district court held that Thompson could not have brought suit prior to July 17, 2002, when the Louisiana Fourth Circuit Court of Appeals overturned Thompson's murder conviction; therefore, Thompson's suit was timely brought within one year of that day—July 16, 2003. Defendants argue that Thompson's claims accrued prior to July 17, 2002, and thus that his suit was untimely.

We review a district court's ruling on summary judgment de novo. *United States v. Corpus*, 491 F.3d 205, 209 (5th Cir. 2007). To determine the statute of limitations for an action brought pursuant to § 1983, we look to the forum state's personal injury limitations period. *Jacobsen v. Osborne*, 133 F.3d 315, 319 (5th Cir. 1998). In this instance, Louisiana's personal injury limitations period is one year. *Id.*; *see* LA. CIV. CODE ANN. art. 3492. The parties do not dispute that a one-year statute of limitations applies to this case.

Instead, their dispute centers on when the one-year period began to run.

Federal law governs the date on which a § 1983 claim accrues and the limitations period starts to run. *See Wallace v. Kato*, 127 S. Ct. 1091, 1095 (2007). Defendants propose two dates when Thompson's claims accrued: (1) June 29, 1999—when Thompson's armed robbery conviction was vacated (insofar as the claim arises from the *Brady* violation during the armed robbery trial); and (2) May 26, 2001—when Thompson's death sentence was changed to life in prison (insofar as the claim asserts damages he suffered while incarcerated on death row). Use of either date would result in all or part of Thompson's suit being barred by limitations. Thompson counters that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), he could not have filed suit until July 17, 2002—the day the court of appeals reversed his murder conviction. Because his action was filed within one year of that day, Thompson contends it was timely. The district court agreed with Thompson, basing its decision on *Heck* and the Louisiana court of appeals's decision that the withheld blood evidence caused Thompson not to testify in his murder trial. We thus turn to *Heck*'s application in these circumstances.

Pursuant to *Heck*, a plaintiff must prove that a conviction or sentence has been reversed, expunged, declared invalid, or called into question by the issuance of a writ of habeas corpus before the plaintiff may proceed with a civil suit for damages for wrongful conviction or imprisonment. *Id.* at 486–87; *see also Wallace*, 127 S. Ct. at 1098 (holding that the *Heck* rule "delays what would otherwise be the accrual date of a tort action until the setting aside of *an extant*

conviction which success in that tort action would impugn"). The *Heck* Court elaborated on the standard as follows:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (footnote omitted). Thus, for example, if Thompson had attempted to bring suit for a *Brady* violation related to his attempted armed robbery conviction prior to when that conviction was vacated, his claim would have been barred by *Heck* because a finding that the government withheld exculpatory evidence would necessarily imply the invalidity of Thompson's armed robbery conviction. *See id.* at 479, 490 (dismissing claim that government had destroyed exculpatory evidence because conviction had not been vacated); *Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (same).

In the instant case, the rationale underlying the decision by the district court is that a suit regarding the withheld blood evidence in the armed robbery case would have called the murder conviction into doubt;

therefore, until the murder conviction was overturned, *Heck* would have barred any civil suit. The key on appeal, then, is whether a finding that the DA's Office withheld the blood evidence in the armed robbery case in violation of *Brady* would "necessarily imply" that the murder conviction was invalid. If not, then Thompson's suit regarding the armed robbery could have been brought as soon as the attempted armed robbery conviction was vacated in 1999, and that portion of Thompson's suit would be untimely.

When reversing Thompson's murder conviction, the Louisiana appeals court concluded that Thompson "would have testified at his murder trial but for the improper attempted armed robbery conviction." *Thompson*, 825 So. 2d at 556.[9] Defendants have offered no argument in opposition to this conclusion. Moreover, Defendants' actions inextricably linked the two trials. Defendants stipulated that they sought to reverse the order of the armed robbery and murder trials because "a conviction of Mr. Thompson on the armed robbery charge would effectively preclude Mr. Thompson from taking the witness stand in his own defense at the murder trial, and that the armed

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[9] The state court specifically noted the following statement by Thompson's counsel from the trial transcript of Thompson's first murder trial:

> Given the fact that were Mr. Thompson to take the stand, [his armed robbery conviction] would have been used against him, and after consulting with us, Mr. Thompson concurred in our decision not to take the witness stand, Your Honor.

Thompson, 825 So. 2d at 556.

robbery conviction could be used in the penalty phase of the murder trial to obtain a death sentence."[10] Therefore, Thompson's failure to testify at his murder trial may be directly attributed to the district attorney's conduct that resulted in the *Brady* violation in the armed robbery case.

A criminal defendant's opportunity to testify in his own defense is a constitutionally protected right. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). In this case, the Louisiana court determined that Thompson was wrongfully denied his right to testify by the DA's Office's conduct. *Thompson*, 825 So. 2d at 557. The court further held that the violation of Thompson's right to testify was structural error, not reviewable for harmlessness, and that, as a consequence, Thompson was entitled to an automatic reversal of his murder conviction. *See id.* at 557–58. Because it is undisputed that the *Brady* violation in the armed robbery case prevented Thompson from testifying in his murder trial and because the Louisiana court found that reversal of the murder trial was an automatic result of the violation in the armed robbery trial, Thompson's lawsuit regarding the *Brady* violation in the armed robbery case necessarily implied

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[10] During Thompson's attorney's cross-examination of Williams at trial, the jury heard his deposition testimony that the two cases were intertwined:

> Q: And that's, in fact, how it was handled with the prosecution of Mr. Thompson, the cases were seen as—as intertwined and the prosecution of both was coordinated, right?
>
> [Williams]: Yes.

that Thompson's murder conviction was invalid. *Cf. Edwards v. Balisok*, 520 U.S. 641, 647–48 (1997) (holding that success on a claim alleging structural error (bias on the part of the decisionmaker), which was not reviewable for harmlessness, "necessarily impl[ies] the invalidity of the punishment imposed" (citing *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927))). Therefore, as the district court correctly held, pursuant to *Heck*, Thompson could not have brought suit regarding the *Brady* violation in the armed robbery case until his murder conviction was overturned.[11] *Cf. Wappler v. Carniak*, 24 F. App'x 294, 296 (6th Cir. 2001) (unpublished) (holding that a § 1983 action does not exist where the plaintiff "claimed that his misdemeanor conviction was used to enhance his sentence in another case" because "a successful ruling on his claim would imply the invalidity of both his guilty plea and his sentence in the later case").

As a result, Thompson's claims in this case did not accrue until July 17, 2002, when the court of appeals vacated his murder conviction. Thompson filed suit within one year of that date, and thus, his lawsuit is

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[11] Defendants did not argue in the district court that Thompson's damages related to the time he spent on death row accrued when his death sentence was changed to life in prison. We generally will not consider an argument raised for the first time on appeal. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). In any event, Defendants' argument is incorrect. Thompson has asserted § 1983 claims stemming from the nonproduction of the blood evidence in the armed robbery trial and the nonproduction of other evidence during the murder trial. His time spent on death row was a harm flowing from one or both of those claims, but not an independent claim that could separately accrue.

not barred by the one-year statute of limitations. Consequently, we affirm the district court's denial of Defendants' motion for summary judgment on this point.

B. Sufficiency of the Evidence

Defendants next contend that the evidence admitted at trial does not support a finding of deliberate indifference. Defendants raised this issue in their motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, which the district court denied. This court reviews the denial of a motion for judgment as a matter of law de novo. *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). However, our standard of review with respect to a jury verdict is especially deferential. *Id.* We can reverse the jury's verdict only if "the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 282 (5th Cir. 2007) (internal quotation marks omitted). We must draw all reasonable inferences in favor of the nonmovant and "disregard all evidence favorable to the moving party that the jury is not required to believe." *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007) (internal quotation marks omitted). We may not make credibility determinations or weigh the evidence. *Id.*

Because this case was brought against the DA's Office and the district attorneys in their official capacities, Thompson must prove that the violation of his constitutional rights was the product of a policy or custom of the DA's Office. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Certain actions of a

policymaker can also subject a governmental entity to liability under § 1983. *See Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005). In this case, the district court determined that Connick, as District Attorney, was a policymaker for the DA's Office. With respect to claims that a constitutional violation was caused by the government's failure to train its employees, a plaintiff must prove that the government was deliberately indifferent to the need to train. *City of Canton v. Harris*, 489 U.S. 378, 388–89 (1989) ("Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983.").

Here, the jury rejected Thompson's argument that Connick's *Brady* policy was unconstitutional but accepted the argument that Connick was deliberately indifferent to the need to train on *Brady* issues. On appeal, Defendants set forth numerous arguments as to why the jury could not reasonably have concluded that Connick acted with deliberate indifference.

1. No Pattern of Similar Violations

Defendants first argue that there was no evidence of a pattern of similar *Brady* violations and that such a pattern is necessary to establish deliberate indifference. Thompson does not argue that there was evidence of a pattern, but instead contends that evidence of a pattern is not always necessary for a finding of deliberate indifference.

In *City of Canton*, the Supreme Court set the degree of fault for a failure-to-train case as deliberate

indifference. 489 U.S. at 388. In elaborating on that standard, the Court stated that

> it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 390. The Court then included an example in a footnote:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Id. at 390 n.10 (citation omitted). Thus, the Supreme Court recognized two possible methods of showing deliberate indifference: (1) when the need for training is obvious based on the nature of the conduct at issue and the potential for harm and (2) when there is a

pattern of violations that makes it obvious to city policymakers that more training is necessary.

The Supreme Court reaffirmed the possibility that a plaintiff could prove deliberate indifference without having to show a pattern of constitutional violations in *Board of the County Commissioners v. Brown*, 520 U.S. 397, 409 (1997), when it observed,

> In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.

Therefore, the Supreme Court has made it clear that a pattern of constitutional violations is not always a prerequisite to a showing of deliberate indifference. However, the Court has limited those situations to circumstances in which the need for training is "obvious" and when the violation of rights is a "highly predictable consequence" of the failure to train.

Fifth Circuit case law is not to the contrary. None of the cases cited by Defendants in support of the pattern requirement states that evidence of a pattern is *always* necessary. Instead, the cases all qualify the requirement by stating that a pattern is "generally" or "usually" necessary. *See, e.g.*, *Rios v. City of Del Rio*, 444 F.3d 417, 427 (5th Cir. 2006) (stating that proof of deliberate indifference "generally requires" the plaintiff to demonstrate a pattern of violations); *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (stating that a plaintiff "usually" must demonstrate a pattern of violations); *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (stating that deliberate indifference "generally requires" proof of a pattern of violations). This court's precedent is thus consistent with the Supreme Court's limitation of single-incident liability to the narrow circumstances in which the need for training is "obvious" and when the violation of rights is a "highly predictable consequence" of the failure to train.

Indeed, this court has explicitly recognized that a single incident of misconduct can, in the right circumstances, give rise to a claim of deliberate indifference. *See Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005) (discussing the Supreme Court's description in *Board of the County Commissioners v. Brown*, of when a single act may be sufficient to prove deliberate indifference); *Burge v. St. Tammany Parish* (*Burge II*), 336 F.3d 363, 373 (5th Cir. 2003) (recognizing potential applicability of single-incident liability where "the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a

particular policy or failure to train"); *Brown v. Bryan County*, 219 F.3d 450, 463 (5th Cir. 2000) (permitting a jury finding of liability for deliberate indifference where no pattern of similar incidents existed in a case involving a failure to train or supervise). Consequently, the fact that Thompson did not establish a pattern of *Brady* violations by the DA's Office is not dispositive of his claims.

Further, the evidence developed at trial clearly demonstrates that this case falls within the Supreme Court's description of the narrow range of situations that do not require a pattern of misconduct before deliberate indifference can be shown. Here, there was evidence that Connick was aware that the attorneys in the DA's Office would be required to confront *Brady* issues on a regular basis and that failure to properly handle those issues would result in constitutional violations for criminal defendants. As Connick testified,

> Q: . . . Would you agree, Mr. Connick, that as the District Attorney, you were aware that from time to time the State would come into possession of *Brady* evidence in criminal cases?
>
> [Connick]: Of course.
>
> Q: And would you also agree with me that you also knew that if the favorable evidence came into possession of the State and if it wasn't produced to the defense, the result of that would be a violation of the accused's constitutional rights?
>
> A: Yes.

Thompson's legal expert, Joseph Lawless, further testified:

> [E]very district attorney knows that at some point in a prosecutor's career they are going to come into possession of evidence that tends to be exculpatory of a defendant or tends to impeach other witnesses. And they also understand that failure to turn that information over under *Brady* is going to result in a serious constitutional violation of a criminal defendant's rights.

There was also evidence that the need to train about *Brady* was obvious. Many of the attorney witnesses in this case testified that *Brady* was a "gray" area, subject to interpretation. Connick stated that *Brady* is "an elastic thing, according to some of the justices too, and that makes it a little more difficult to find a—a standing definition of what *Brady* is. It depends on the evidence, I guess, but primarily the interpretation of *Brady* by judges." Williams, who prosecuted Thompson for both the armed robbery and the murder, testified as follows:

> Q: Even though you went to law school and you read case reports and you read opinions as they came out, there were still gray areas [regarding *Brady*] to an educated lawyer such as yourself?
>
> [Williams]: Yes.

Whittaker agreed with that same sentiment:

> Q: You would agree with me that under *Brady* there can be some gray areas?

[Whittaker]: Correct.

Q: Sometimes it's not crystal clear whether a document or piece of information has to be turned over to the defense or not?

A: That's true.

Besides the difficulty in interpreting *Brady*, there was evidence that many of the attorneys in the DA's Office were only a few years out of law school, and thus lacking the legal experience that could have helped them clarify *Brady* issues without additional training.

Q: Would you agree with me that in 1985, many of the assistants, the Assistant District Attorneys in your office were coming fresh out of law school?

[Connick]: Yes.

Q: And in 1985, you had section chiefs that were less than four years out of law school, like Mr. Dubelier, for example?

A: Yes.

Whittaker further testified:

Q: And decisions on whether to produce *Brady* material, whether material was *Brady* material and had to be produced, those kinds of decisions would sometimes get made by inexperienced lawyers, just a few weeks out of law school with no training?

> [Whittaker]: I imagine that's certainly possible, yes.

Finally, Whittaker also testified that training in *Brady* would have been helpful:

> Q: It would have been helpful to have a little training, wouldn't it, to kind of show you when you started what the *Brady* rule was so you could deal especially with those gray areas?
>
> [Whittaker]: I think it would be a good thing, yes.

Thus, the jury heard evidence that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful.

Consequently, Thompson has met his burden of demonstrating that it was obvious that training about *Brady* was necessary and that a highly predictable consequence of failing to train attorneys about *Brady* was the infringement of the constitutional rights of those accused of crimes, such as Thompson.[12] No pattern of similar violations was necessary to put Connick on notice that training on *Brady*'s

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[12] We do not hold as a matter of law that *Brady* training is always required. Our decision is based on the specific facts of this case that demonstrated that, at least in the Orleans Parish DA's Office in 1985, *Brady* training was needed.

requirements was needed.[13] Therefore, under the tests set out in *City of Canton* and *Board of the County Commissioners v. Brown*, Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent, and the district court did not err in denying Thompson's motion for judgment as a matter of law on that ground. *See Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) (finding that a plaintiff sufficiently alleged deliberate indifference in failing to train on *Brady* even though no pattern of violations was mentioned).

2. Deegan's Act Broke Causation

Defendants next contend that Deegan's unanticipated action in intentionally hiding the blood evidence in violation of Connick's policy requires the conclusion that Connick was not deliberately indifferent and breaks any causal link between the alleged failure to train and Thompson's injury. Thompson responds that there was sufficient evidence for the jury to conclude that Deegan was not solely responsible for the constitutional violations in this case.

Defendants first argue that there must be evidence that Connick knew of and failed to control Deegan's

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[13] As discussed below, the jury heard ample evidence from which it was entitled to conclude that Connick provided no *Brady*-specific training. Thus, this is not a case wherein the plaintiff failed to raise questions about the adequacy of on-the-job or other forms of training. *Cf. Burge II*, 336 F.3d at 372–73 (refusing to consider single-incident liability in which there was no evidence of inadequacy of on-the-job training).

"known propensity" for violating the constitutional rights of others to demonstrate deliberate indifference. *See Roberts*, 397 F.3d at 292. This assertion is incorrect. Failing to control an employee's known propensity for violating the law is only one of several ways to demonstrate deliberate indifference. *See Sims v. Adams*, 537 F.2d 829, 831–32 (5th Cir. 1976) (listing multiple ways to establish a supervisory defendant's § 1983 liability, including failing to act despite knowledge of an employee's propensity for misconduct). In *Roberts*, the court confronted a situation in which the training was adequate. 397 F.3d at 294 (referencing the "overwhelming evidence" that the officer was adequately trained). In light of this, the plaintiff in that case had to prove that the police chief knew that, despite his training, the officer was still committing improper acts; the plaintiff failed to show inadequate training generally. Thus, failing to demonstrate that Deegan had a known propensity for hiding *Brady* material is not dispositive of Thompson's claim; he did not pursue that theory of liability but rather alleged a failure to adequately train, supervise, and monitor.

Defendants next cite the Fourth Circuit's opinion in *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994), for the proposition that a supervisor cannot reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. Although we have no grounds to disagree with that statement, the Fourth Circuit's reasoning is not entirely applicable in this case. *Shaw* refers to anticipating misconduct from "properly trained employees." *Id.* (internal quotation marks omitted). As discussed later in this opinion, there was evidence that the attorneys in this case were

not trained on *Brady*'s requirements. Therefore, *Shaw* does not mandate a verdict for Defendants.

Defendants also generally allege that Deegan's confession to Riehlmann exculpates them from any failure to train because Deegan intentionally acted against his training in suppressing the evidence. However, Defendants read more into Deegan's statement to Riehlmann than is actually there. According to Riehlmann's affidavit, "the late Gerry Deegan said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." At trial, Riehlmann recalled that Deegan made this statement in April 1994, shortly after Deegan had been diagnosed with terminal cancer.

To begin with, Riehlmann's statement that Deegan's act was "intentional" does not necessarily mean that Deegan acted with criminal intent. It could be interpreted by the jury to mean that Deegan's actions were deliberate and that he did not accidentally lose the evidence. Further, Deegan never explained why he suppressed the evidence. It could be that Deegan did not understand his *Brady* obligations at that time, but in the period between 1985 and his confession in 1994, he came to understand that his actions were wrong. As described earlier, several of the former assistant district attorneys testified that their *Brady* obligations were not always clear. It is not unreasonable to conclude that Deegan suffered from a similar lack of understanding.[14]

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[14] Indeed, Williams, Deegan's co-counsel in the armed robbery case, continued to display some confusion over *Brady* when he

The evidence Defendants presented was also ambiguous as to whether Deegan was the only person who was aware of the blood evidence. Riehlmann's testimony at trial confirmed the uncertainty of his recollection of Deegan's statement:

> Q: Did he say that anyone else was involved with the suppression or did he just simply say, "I did it"?
>
> [Riehlmann]: He may have said that someone else was involved, but I don't recall.

Riehlmann also explained that he could not say whether Deegan told him that Dubelier or Williams were involved. Further, Riehlmann admitted that he did not know to what piece of evidence Deegan was referring—the bloody pants leg, the blood report, or both:

> Q: Mr. Deegan didn't tell you specifically about a blood report as opposed to blood evidence, did he?

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testified in the instant matter that *Brady* evidence did not include documents that could be used to impeach a witness; instead, he stated that *Brady* evidence is only evidence which would tend to exculpate a person charged with a crime. Impeachment evidence has been considered *Brady* material since 1972. *See Giglio*, 405 U.S. at 154. As discussed below, numerous witnesses expressed similar uncertainty about the duty to turn over exculpatory blood evidence if they were not aware of the defendant's blood type. Defendants do not, however, challenge the district court's ruling as a matter of law (based on the holding of the Louisiana court of appeals) that the nonproduction of the blood evidence was a violation of *Brady*'s requirements.

> [Riehlmann]: I don't remember exactly what he said.

Thus, Riehlmann's recollection of Deegan's confession does not rule out the possibility that someone else could have been involved in the suppression of either the bloody pants leg or the blood report.

In contrast to Defendants' theory, the jury heard evidence suggesting that the *Brady* violation was not solely the result of Deegan's actions. Whittaker testified that he had seen the report and placed it on Williams's desk, and Riehlmann testified that he had no reason to believe that Deegan would have taken the report off of Williams's desk. Although denying that he ever saw the report, Williams admitted that he was aware there was blood evidence in the case and that he deliberately avoided mentioning blood evidence at Thompson's armed robbery trial. Former assistant district attorney Glas testified that he helped investigate the incident when it was brought to Connick's attention in 1999 and that it was his impression that Whittaker and Williams were covering something up. Also, according to Glas, Williams told Jay LaGarde that the blood evidence was "inconclusive." Thus, although there was evidence that Deegan acted alone, there is also evidence from which the jury could have believed that others had a hand in failing to turn over the exculpatory evidence.

Further, throughout the trial of this matter, Defendants attempted to place the blame for Thompson's conviction on Numa Bertel ("Bertel"), Thompson's defense counsel at his armed robbery case. Defendants argued that, because Williams stated at the motion to suppress hearing that the government

wanted to take Thompson's blood, Bertel should have been aware that there was blood evidence and made an effort to discover it. Such reasoning could easily be applied to Defendants in this case, whose knowledge of the blood evidence was superior to Bertel's.

In sum, then, drawing all inferences in favor of Thompson, a reasonable jury could have believed that the constitutional violations in this case were not solely attributable to Deegan's alleged criminal conduct, but instead were the result of confusion over *Brady* by various attorneys in the DA's Office.[15] "A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296–97 (5th Cir. 2005) (internal quotation marks omitted). Because there is a legally sufficient evidentiary basis for the jury's verdict, we may not reverse on this ground.

3. The Blood Evidence Was Obviously Exculpatory

Next, Defendants assert that because the blood evidence was obviously exculpatory and withholding the evidence was such a clear violation of the law, no

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[15] We also note that Defendants' argument on this point says nothing about the police reports that were not turned over to defense counsel in the murder trial. The police reports were thoroughly discussed at the trial of this matter and Defendants disputed among themselves whether the police reports were *Brady* material that needed to be disclosed to Thompson. Deegan was not involved in the murder trial; therefore, Deegan did not cause any constitutional violations with respect to that trial and the withheld police reports.

training could have helped in this instance. Defendants rely on *Burge v. Parish of St. Tammany* (*Burge I*), 187 F.3d 452 (5th Cir. 1999), for their claim that there can be no failure to train when the evidence is obviously exculpatory. In *Burge I*, the plaintiff claimed that the district attorney failed to implement policies and training to ensure that all materials, including exculpatory evidence, that were gathered by the Sheriff's Office were transmitted from the Sheriff to the District Attorney and then disseminated to the appropriate assistant district attorneys and turned over to the criminal defendants. *Id.* at 472. After reviewing the evidence, the court determined that there was no deliberate indifference. *Id.* at 473. The court went on to state that, even if the training were inadequate, the material at issue "was of such a quality and quantity that any reasonably qualified and experienced prosecuting attorney would have recognized it as *Brady* material that he was required to disclose." *Id.* at 475. Therefore, any alleged failure to train did not cause the constitutional violation. *Id.*

The problem with Defendants' argument in this case is that several of Defendants' own witnesses contended that the blood evidence was not *Brady* material in the absence of knowledge of Thompson's blood type. Val Solino ("Solino"), the Rule 30(b)(6) representative for the DA's Office, testified that,

> [I]f I'm holding a crime lab report that says blood on a shoe is B, and I have some reason to believe that the blood on the shoe came from the perpetrator, and I don't know what the perpetrator's blood type is, do I feel I have a

> legal requirement at that point to disclose that lab report? No.[16]

Glas testified that, in 1999, Connick argued with him that there was no duty to turn over the report unless the attorney knew that it did not match Thompson's blood type. Although Williams later testified that he would have turned the report over, he stated that, had he been in charge of responding to Thompson's request for evidence in the armed robbery trial, he would simply have responded that the evidence was "available for inspection." With respect to the withheld police reports, Dubelier argued at trial that he was not required under *Brady* to turn them over.

Therefore, despite Defendants' current argument on appeal, Defendants' position at trial was less than clear about whether the evidence at issue was obviously exculpatory. Given Defendants' conflicting claims, there is no cause to overturn the verdict on the ground that the material was obviously exculpatory.

4. Connick Provided Adequate Training, Supervision, and Monitoring

Defendants' next contention is that Connick provided adequate training in the form of on-the-job training, Saturday training sessions, dissemination of memos and case opinions, and counseling. Further, each attorney had received training in law school and

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[16] Solino later attempted to modify that statement by claiming that he would not have disclosed the report upon receipt of it, but "one minute or one second" later, he would have taken further steps to see if it should be disclosed.

participated in self-training after law school. In support of their argument, Defendants rely on two cases from this court that concern training on *Brady* issues.

First, in *Burge I*, the evidence showed that there was no special training program on *Brady*. 187 F.3d at 471. Instead, the District Attorney "relied on the professional education, training, experience, and ethics of [his subordinates] in the performance of their constitutional responsibilities." *Id.* However, the plaintiff in *Burge I* did not "focus directly on the adequacy of the training or supervision of the District Attorney's assistants and employees in relation to the tasks that particular persons must perform" but instead attempted to identify deficiencies in the procedures relating to the surrender of *Brady* material. *Id.* at 473. Thus, the office procedures related to *Brady* materials were called into question in *Burge I*, not the training on *Brady*.[17]

Defendants also rely on this court's decision in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), which, like the instant appeal, concerned the Orleans Parish DA's Office's failure to train on *Brady* issues. There, however, the plaintiff conceded that the training on

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[17] When the case returned in *Burge II*, this court held that in some instances on-the-job training regarding such procedures may be sufficient. *See* 336 F.3d at 373. We did so, however, after the plaintiff produced no evidence showing its inadequacy. *See id.* ("Unlike the facts of [*Brown v.*] *Bryan County*," which permitted single-incident liability, "there is no evidence in the present case . . . that the on-the-job training those employees received was inadequate."). Here, Thompson produced substantial evidence that any on-the-job training was inadequate.

Brady was adequate in 1995. *Id.* at 629, 638. That concession says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985.[18] Thus, neither *Burge I* nor *Cousin* stands for the proposition that a district attorney may rely solely on the law school or on-the-job training of attorneys.

Although there was some evidence in this case that attorneys in the DA's Office might have received some training, the jury was entitled to believe the ample evidence that the attorneys received no training on *Brady*'s requirements. None of the three prosecutors involved in Thompson's prosecutions recalled receiving any *Brady*-specific training. For example, Williams testified that he did not recall any training related to *Brady*'s requirements:

> Q: What type of training was there at the DA's office regarding *Brady* material?
>
> [Williams]: Again, I don't recall any specific training.

Dubelier testified similarly:

> Q: Do you recall any specific *Brady* training?

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[18] The DA's Office changed its *Brady*-related instruction between Thompson's trials and the events in *Cousins*. According to Defendants' witnesses in this case, around 1987, the DA's Office codified its policy regarding disclosure of *Brady*-related materials. Later, in the 1990s, it began a continuing legal education program that covered *Brady*'s requirements.

> [Dubelier]: I don't recall specifically any training.

As did Whittaker:

> Q: So they didn't sit down and do a little seminar for you on what *Brady* was and how to live with it?
>
> [Whittaker]: Not that I recall.

Other attorneys in the DA's Office at the time of Thompson's prosecutions testified consistently. For example, Riehlmann stated, "To answer your question specifically as it relates to *Brady*, I don't recall that I was ever trained or instructed by anybody about my *Brady* obligations, no." Indeed, the government stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson."[19] That is, no prosecutor testified about a specific example of *Brady*-related on-the-job training, *Brady*-related Saturday training sessions, *Brady*-related advance sheets, or counseling or pretrial of a case that resulted in *Brady*-specific discussions. This evidence supported the jury's finding that Connick failed to adequately train his attorneys on *Brady* and lent credence to the district court's conclusion that Thompson did not need to prove a pattern of similar violations, as discussed above. *See City of Canton*, 489 U.S. at 390 n.10; *Walker*, 974 F.2d at 300 ("[W]e conclude that a

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[19] Further, Connick himself testified that he "stopped reading law books" when he became District Attorney in 1974.

complete failure by the DA in 1971 to train ADAs on fulfilling *Brady* obligations could constitute deliberate indifference sufficient to give rise to § 1983 municipal liability.").

5. Miscellaneous Arguments

Defendants make two other arguments regarding the sufficiency of the evidence in this case: that there was no evidence (1) that Connick was deliberately indifferent in failing to establish policies or procedures to ensure the acquisition of *Brady* material from the police department and (2) that Connick was deliberately indifferent to the need to establish an open-file policy. Neither argument merits much attention.

The need for a policy to ensure the acquisition of *Brady* material from the police department was not a theory of liability argued to the jury. It came up in a roundabout way in the post-trial briefing, and there is no indication that the district court relied on any arguments in that regard. The open-file policy was mentioned at trial, but only in the context that the lack of an open-file policy increased the need to make sure that the attorneys understood *Brady*. Again, it was not argued to the jury as a theory of liability. Therefore, there is no basis for reversal on either of these grounds.

C. Jury Instructions

Defendants next argue that the district court erred in its instructions to the jury regarding deliberate indifference and by not giving the jury various other instructions. We review a jury charge for abuse of

discretion. *Julian v. City of Houston*, 314 F.3d 721, 727 (5th Cir. 2002). In doing so, we use a two-pronged standard of review to assess the propriety of the given instructions:

> First, the challenger must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.

Johnson v. Sawyer, 120 F.3d 1307, 1315 (5th Cir. 1997) (internal quotation marks and citation omitted).

"A prerequisite to our review of the instructions in this manner, however, is that the objection must have been brought to the attention of the district court at trial." *Navigant*, 508 F.3d at 293 (internal quotation marks omitted). Pursuant to Federal Rule of Civil Procedure 51(c)(1), "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Failure to properly object to an instruction will result in a plain error review, which will require Defendants to establish (1) error; (2) that is clear or obvious; (3) that affects substantial rights; and (4) that, consistent with the court's discretion, not correcting the error would seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *See Wright v. Ford Motor Co.*, 508 F.3d 263, 272 (5th Cir. 2007). With that in mind, we turn first to the instructions regarding deliberate indifference.

1. Deliberate Indifference Instructions

Because the jury found that the DA's Office was deliberately indifferent to the need to train its attorneys on *Brady*, many of Defendants' arguments concerning the jury instructions have to do with the issue of deliberate indifference. Defendants argue that the district court (1) failed to properly define deliberate indifference for the jury, (2) incorrectly indicated that an unintentional failure to monitor was sufficient for liability, and (3) incorrectly stated that deliberate indifference did not necessarily mean intentional. We address each argument in turn.

a. Failure to Define Deliberate Indifference

Defendants assert that, although the district court informed the jury of what deliberate indifference was not (negligence or gross negligence), the district court never explained to the jury what deliberate indifference was, leaving the jury to guess at the term's meaning. Defendants did not raise this objection before the district court, so we review their claim for plain error. *See Navigant*, 508 F.3d at 295–96.

Having reviewed the jury instructions given by the district court, we conclude that Defendants' assertion is unfounded. As noted earlier, on the topic of deliberate indifference, the district court instructed the jury as follows:

> Deliberate indifference requires a showing of more than negligence or even gross negligence. For liability to attach because of a failure to train, the fault must be in the training program

> itself, not in a particular prosecutor. In order to find that the district attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference, you must find that Mr. Thompson has proved each of the following three things by a preponderance of the evidence:
>
> > First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused.
> >
> > Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed.
> >
> > Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights.

To paraphrase, then, the district court told the jury that for a failure to train to be deliberately indifferent, there must be proof that the District Attorney knew that prosecutors would be confronted with difficult legal issues that had a substantial impact on Defendants' constitutional rights.[20]

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[20] The three-step structure of the jury instructions came from the Second Circuit's opinion in *Walker*, 974 F.2d at 297–98.

This tracks the Supreme Court's requirement that a failure to train is deliberately indifferent when "the need for more or different training is . . . obvious, and the inadequacy . . . likely to result in the violation of constitutional rights." *City of Canton*, 489 U.S. at 390; *see also Estate of Davis*, 406 F.3d at 381 (stating that an official acts with deliberate indifference when he "disregard[s] a known or obvious consequence of his action" (internal quotation marks omitted)). Indeed, in their proposed jury charge, Defendants themselves requested a nearly identical instruction regarding the above three-element standard.

Thus, rather than leaving the jury with nothing on which to base its decision, the district court spelled out the requirements of deliberate indifference as described by the Supreme Court and this court. Further, as discussed below, the district court correctly informed the jury that deliberate indifference was more than negligence and gross negligence, but less than intentional. Consequently, we find no error, plain or otherwise, in this aspect of the district court's instructions.

b. Response to Jury Question

Defendants next contend that the district court's response to the jury's question was erroneous because it left the jury with the impression that deliberate indifference could mean any unintentional failure to monitor. As noted earlier, the jury sent out the following question during its deliberations:

> What does "Deliberate" Indifference mean? Does it mean <u>intentional</u> or would "Failure to monitor" be considered Deliberate?

The district court responded:

> "Deliberate Indifference" does not necessarily mean intentional, but does require more than mere negilgence [sic] or even gross negligence. Please refer to pages 26 + 27 of the legal instructions for further guidance.

Defendants interpret the jury's question as presenting two options of what deliberate indifference might mean: (1) intentional conduct or (2) any unintentional failure to monitor. Because the district court stated that deliberate indifference was not necessarily intentional, Defendants assert that the jury must have believed that any unintentional failure to monitor was sufficient.

Review of the transcript of the discussion between the court and counsel regarding how to respond to the jury's question reveals that defense counsel did not raise this point of alleged error before the district court. Regardless, we see no error in the district court's response. Defendants' assertion that the jury could have believed that any "unintentional" failure to monitor was sufficient lacks support in the record. The jury was instructed that the failure to train or monitor had to be "deliberate" and could not be based on mere negligence or gross negligence. Therefore, contrary to Defendants' claims, *any* "unintentional" act would not have been sufficient to create liability.

"When evaluating the adequacy of supplemental jury instructions, we ask whether the court's answer was reasonably responsive to the jury's question and whether the original and supplemental instructions as a whole allowed the jury to understand the issue

presented to it." *United States v. Stevens*, 38 F.3d 167, 170 (5th Cir. 1994). In doing so, we give the district court wide latitude in deciding how to respond to such questions. *Id.* Here, the jury note indicated confusion over the appropriate level of fault. The district court's response reiterated the appropriate level and directed the jury back to the relevant section of the jury charge that described deliberate indifference in more detail.[21] If, in response to a jury question, the district court directs the jury's attention to the original instructions, the response is deemed sufficient if the original instructions are an accurate statement of the law. *United States v. Arnold*, 416 F.3d 349, 359 n.13 (5th Cir. 2005). We presume the jury followed the instructions of the district court, *see Hollis v. Provident Life & Accident Ins. Co.*, 259 F.3d 410, 417 (5th Cir. 2001), and the instructions did not permit a finding of liability based on an "unintentional" failure to monitor.[22]

c. Intentional Conduct

Defendants next assert that the district court's response that deliberate indifference "does not necessarily mean intentional" is an inaccurate statement of the law. It is questionable whether Defendants adequately preserved this objection.

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[21] Pages 26 and 27 of the jury instructions contain the three-part description of deliberate indifference quoted earlier.

[22] To the extent that Defendants complain about the "failure to monitor" theory being included in the charge, we find no error. Defendants never objected to that language before the district court and even proposed a jury charge that included "failure to supervise or train" language.

During the colloquy regarding the jury note, defense counsel stated, "It has to be, you know, if not completely intentional, I think it should be either intentional or reckless disregard, he just didn't care about it." However, defense counsel later stated, "Mr. Connick suggested to me that he thinks the word deliberate means intentional." Because we conclude that the district court's statement was legally correct, we do not need to determine whether the appropriate standard of review is abuse of discretion or plain error.

Defendants cite several cases for the proposition that deliberate indifference requires a "conscious disregard for the known and obvious consequences of [one's] actions," *Bd. of the County Comm'rs v. Brown*, 520 U.S. at 413 n.1, or that it is "an intentional choice, not merely an unintentionally negligent oversight." *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992).[23] This court has recognized, though, that deliberate indifference and intent are not the exact same standard, as deliberate indifference is "a lesser form of intent." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (internal quotation marks omitted). Further, the Supreme Court is well aware of the standard of intent but chose to set the level of fault in failure-to-train cases as deliberate indifference. *See City of Canton*, 489 U.S. at 388. In

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[23] We do not consider the cases cited by Defendants that describe deliberate indifference in the context of the Eighth Amendment, as the Supreme Court has held that to be a different standard than the one articulated in *City of Canton*. *See Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (noting that the deliberate indifference standard in *City of Canton* "is not an appropriate test for determining the liability of prison officials under the Eighth Amendment").

the context of municipal liability under § 1983 for failure to train, deliberate indifference is akin to objective recklessness. *See Farmer*, 511 U.S. at 840–41 (describing *Canton*'s standard as "objective" because it permits "liability to be premised on obviousness or constructive notice").

Therefore, it would have been incorrect to instruct the jury that deliberate indifference means intentional indifference, as precedent establishes that the terms are not interchangeable. Consequently, Defendants have failed to establish reversible error with respect to the deliberate indifference instructions given by the district court.

2. Other Missing Jury Instructions

Finally, Defendants contend that the jury instructions never informed the jury about how to treat certain pieces of evidence, namely (1) the type of training that was provided, (2) Deegan's unanticipated actions, and (3) the lack of a pattern of *Brady* violations. We have explained,

> [A] district court's refusal to give a requested jury instruction is reversible error only if the instruction [(1)] was a substantially correct statement of law, [(2)] was not substantially covered in the charge as a whole, and [(3)] concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the [party's] ability to present a given claim [or defense.]

Kanida v. Gulf Coast Med. Pers., L.P., 363 F.3d 568, 578 (5th Cir. 2004) (fifth alteration in original) (internal quotation marks omitted).

On appeal, Defendants proffer seventeen different instructions that they contend should have been given. Although Defendants included these instructions in their proposed jury instructions filed before trial, Defendants only specifically objected to the absence of two instructions: (1) there can be no deliberate indifference if an attorney intentionally ignores his training and (2) proof of deliberate indifference requires evidence of a pattern of violations.

As for the first instruction, it was covered by the jury charge and, in any case, we do not agree that the failure to give this instruction seriously impaired Defendants' ability to present their argument. Defendants' proffered instruction goes to causation—whether the *Brady* violation was caused by a failure to train or by something else, such as a deliberate criminal act. The jury instructions stated, "For liability to attach because of a failure to train, the fault must be in the training program itself, not in a particular prosecutor." This instruction clearly subsumes Defendants' proposed instruction. Moreover, such reasoning is simply common sense. Defendants were not impaired in any way from making that claim, and they strongly argued to the jury that the *Brady* violation was due solely to Deegan's intentional criminal act. Therefore, there is no reversible error in failing to include that instruction.

As to Defendants' second rejected instruction regarding evidence of a pattern of violations, for the

reasons stated above, *see supra* Section III.B.1, that was not a correct legal statement in the context of this case and Thompson's theory of liability. Therefore, the district court did not err in failing to instruct the jury in that regard.

The remaining instructions that Defendants urge on appeal were not specifically objected to before the district court; thus, we review the district court's action only for plain error. *See Navigant*, 508 F.3d at 295–96. The instructions currently sought by Defendants include instructions that on-the-job training can be sufficient, that law school training can be sufficient, and that no training would have helped if the evidence was obviously *Brady* material. Again, there is nothing that prevented Defendants from making these claims to the jury—they are common sense arguments that do not need the imprimatur of the court to be effective.

In sum, the district court did not need to tell the jury the possible effect of every single piece of evidence. Much of that should be and was done by the attorneys during closing arguments. Because Defendants have not shown that they were seriously impaired in making their defense, we find no reversible error in the district court's refusal to give the requested instructions.

D. Exclusion of Guilt-Related Evidence

Defendants next assert that the district court erroneously precluded them from introducing evidence that Thompson was actually guilty of the Liuzza murder. The issue arose when Thompson filed a motion in limine asking the district court to

(1) preclude Defendants from arguing that Thompson was guilty of murdering Liuzza and (2) exclude evidence bearing solely on Thompson's guilt or innocence of the murder. The district court granted the motion in limine and stated that "[t]he issue of the plaintiff's guilt has already been decided at the second murder trial."

On appeal, Defendants contend that evidence of Thompson's guilt was necessary to establish that Thompson's incarceration and resulting damages were not caused by the *Brady* violation, but rather by Thompson's own guilt. Thompson counters that the issue of his guilt was established at his second murder trial when he was found not guilty and that Defendants are collaterally estopped from attacking that result. This court reviews a district court's evidentiary rulings for abuse of discretion. *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 265 (5th Cir. 2007). If we determine that the district court abused its discretion, we then apply the harmless error doctrine. *Id.* Thus, unless a substantial right of the complaining party is affected, we will affirm the ruling. *Id.*

To begin with, we note that to the extent the parties argue about "guilty" and "innocent," they misstate the relevant question—the key question for causation purposes is whether the prosecution could have proven Thompson's guilt beyond a reasonable doubt after turning over the *Brady* evidence, not whether Thompson was actually guilty. Thus, to establish that Defendants' *Brady* violation did not cause the guilty verdict, Defendants would have had to demonstrate that they could still prove Thompson was guilty beyond a reasonable doubt in the absence of the

violation. That is exactly what the DA's Office unsuccessfully attempted to do at Thompson's second murder trial in which he was found not guilty.

Although the district court did not reference collateral estoppel, we find that the doctrine provides support for the district court's conclusion. Collateral estoppel applies when (1) the issue at stake in the current litigation is the same as the one in the previous litigation, (2) the issue was actually litigated in the previous litigation, and (3) the determination of the issue in the previous litigation was a necessary part of the judgment. *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip., Inc.*, 434 F.3d 320, 323 (5th Cir. 2005). Here, the issue is whether Defendants can demonstrate that Thompson is guilty of the Liuzza murder beyond a reasonable doubt so that they can claim that the *Brady* violation did not cause Thompson's conviction. Whether Thompson was guilty beyond a reasonable doubt was exactly what was at stake in Thompson's second murder trial.[24] The issue was actually litigated, and its determination was necessary to the judgment. Therefore, Defendants are collaterally estopped from attempting to prove (for the third time) that Thompson murdered Liuzza. Accordingly, we will not reverse the district court's judgment on this ground.

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[24] Defendants argue that their key witness, Freeman, was not available at the second murder trial. The criminal district court, however, permitted Defendants to read the relevant portions of Freeman's testimony from the first trial into evidence.

E. Amount of Damages

Defendants next argue that the $14 million in damages awarded by the jury is excessive and not warranted by the evidence. Because Defendants moved for a remittitur before the district court, we review the denial of the remittitur for an abuse of discretion. *See Vogler v. Blackmore*, 352 F.3d 150, 154 (5th Cir. 2003). We may order a remittitur only if we are "left with the perception that the verdict is clearly excessive." *Alameda Films S A de C V v. Authors Rights Restoration Corp.*, 331 F.3d 472, 482 (5th Cir. 2003) (internal quotation marks omitted); *see also Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 462 (5th Cir. 1995) (per curiam) (stating that damages are excessive when they are "so large as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, [or] so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive" (internal quotation marks omitted)).

Defendants argue that Thompson's experiences in prison were not worth $14 million in damages because (1) he was not raped in prison, (2) he was not denied food or medicine, (3) he had visits from friends and family, (4) he made friends with other inmates, (5) he was able to watch television and play chess, and (6) he had been in jail previously for smaller crimes. Defendants also note that Thompson has been doing well since his release and refers to himself as "blessed." To limit Thompson's experiences to these few facts, however, would present a misleadingly rosy picture of Thompson's life both in prison and after his release.

The evidence at trial showed that Thompson was arrested when he was twenty-two years old and was not released until he was forty. He spent the first two and a half years in the Orleans Parish Prison, where he was housed with the hard core criminals, four or five to a cell. He witnessed multiple rapes and lived in fear of becoming a victim himself. During his time at the Orleans Parish Prison he received only two visits from his family.

In 1987, Thompson was transferred to the Angola State Penitentiary, where he was kept in solitary confinement. He spent twenty-three hours a day in a six-by-nine-foot cell with no windows or air conditioning. Upon entering his cell for the first time, he found personal items from its previous occupant, who had been executed several days before. There were multiple mentally deranged prisoners near him who would yell and scream at all hours and throw human waste at the guards. Indeed, several witnesses testified to the stench that permeated the prison. Thompson grew to know many of his fellow inmates and was aware when they were executed. Thompson himself was given approximately six execution dates during his time there and, as stated earlier, came within one month of his final execution date. While at Angola, he received approximately four visits a year from friends and family.

Thompson himself testified to the mental anguish he suffered as a result of his incarceration. The guilty verdict in the armed robbery case "destroyed" him and "tore [him] down." His mother, girlfriend, and two sons witnessed the jury hand down his death sentence. His girlfriend, who he had planned to marry, married someone else. His grandmother, who had raised him,

died during his time at Angola. His sons grew up without a father. Thompson's final execution date was to be the day before his youngest son graduated from high school. Thompson testified that he would have preferred to be executed than to spend the rest of his life in prison.

Since his release, Thompson has done relatively well considering that he was removed from society for eighteen years. He has married, held several jobs, and is starting an organization to help individuals who have been released from prison after being exonerated. However, Dr. Stuart Grassian, who testified as an expert in the field of psychiatry and mental and emotional illness, specifically in the area of the consequences of long-term confinement, solitary confinement, and incarceration on death row, has diagnosed Thompson with chronic post-traumatic stress disorder. Dr. Grassian described to the jury in detail the suffering of being in solitary confinement with nothing to distract a person from his impending death.

Dr. Grassian stated that, although Thompson suffers from the symptoms of chronic post-traumatic stress disorder, Thompson's strong character has enabled him to function in spite of his pain. Dr. Grassian further described Thompson's feelings of inadequacy and shame over his inability to perform simple tasks, such as using a cell phone or copy machine, that Thompson never learned as a result of his incarceration. According to Dr. Grassian, Thompson is "constantly startled, constantly vigilant, . . . constantly afraid." Dr. Grassian does not see much likelihood that Thompson's symptoms will change over time.

Given the entirety of the testimony about Thompson's experiences and suffering as a result of his wrongful incarceration, we cannot say that the jury clearly erred in awarding him $14 million in damages or that the district court abused its discretion in refusing to order a remittitur. *See Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 559 (5th Cir. 2004) (stating that "reversal is proper only if no reasonable jury could have arrived at the verdict").

Defendants also make a passing assertion that similar cases have resulted in awards of, at most, $400,000 a year, whereas here, Thompson received over $700,000 a year for his eighteen years of imprisonment. *See Jenkins v. Baldwin*, 801 So. 2d 485, 491 (La. Ct. App. 2001) (trial court awarded $12 million for thirty years of incarceration plus over $650,000 in lost wages); *Gibson v. State*, 731 So. 2d 379, 380 (La. Ct. App. 1999) (trial court awarded $5 million for twenty-four years of incarceration plus over $1.6 million in past and future lost income), *rev'd*, 758 So. 2d 782 (La. 2000). However, Defendants fail to cite to a single Louisiana case in which the appropriate amount of damages for a wrongful incarceration was at issue. *See Jenkins*, 801 So. 2d at 501 (failing to reach excessive damages issue because case was reversed); *Gibson*, 731 So. 2d at 385 (refusing to address issue of damages because it was not raised on appeal).[25]

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[25] Through our own research, we have discovered a Louisiana case in which the court held that a wrongfully incarcerated plaintiff was entitled to $40,000 in damages for only twenty-three days of imprisonment. *See Mairena v. Foti*, 816 F.2d 1061, 1063 (5th Cir. 1987) (finding that the district attorney was responsible for three-quarters of the plaintiff's damages and therefore assessing an award of $30,000 against the district attorney). This translates

Further, neither case cited by Defendants concerned an individual who had been wrongfully sentenced to death. Therefore, we find this claim unavailing and affirm the decision of the district court to deny Defendants' request for a remittitur.

F. Attorneys' Fees

Finally, Defendants appeal the district court's decision to award Thompson $1,031,841.79 in attorneys' fees pursuant to 42 U.S.C. § 1988(b). The calculation of attorneys' fees under § 1988 is a two-step process. First, the court must calculate the "lodestar" fee. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998); *see also Riley v. City of Jackson*, 99 F.3d 757, 760 (5th Cir. 1996). The lodestar amount is determined by "multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers." *Migis*, 135 F.3d at 1047. Second, the court decides whether the lodestar amount should be adjusted upward or downward based on the circumstances of the case using the factors articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *Migis*, 135 F.3d at 1047. The twelve *Johnson* factors are

> (1) the time and labor required for the litigation; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to

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to over $600,000 a year for an imprisonment that did not involve death row.

> acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citing *Johnson*, 488 F.2d at 717–19). We review the district court's determination of reasonable hours and rate for clear error and its application of the *Johnson* factors for abuse of discretion. *Id.*

We start by observing that, other than a citation to *Johnson*, Defendants cite no case law in support of their arguments on this point. Although Defendants claim to "incorporate" their arguments before the district court, it is well-established in this circuit that we will not consider arguments by incorporation. *Turner v. Quarterman*, 481 F.3d 292, 295 n.1 (5th Cir.), *cert. denied*, 128 S. Ct. 34 (2007); *Summers v. Dretke*, 431 F.3d 861, 881 n.12 (5th Cir. 2005); *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993); *see also* FED. R. APP. P. 28(a)(9)(A) (requiring appellant's brief to include "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Further, given that Defendants' brief is already 13,977 words long and the limit is 14,000 words, *see* FED. R. APP. P. 32(a)(7)(B)(I), incorporation of arguments in other documents would have the improper effect of lengthening the brief beyond what is permissible. *See Yohey*, 985 F.2d at 225. Therefore, we limit our

analysis to Defendants' somewhat conclusory allegations in their briefing.

Here, the district court first calculated the lodestar amount by considering the hours and rates charged by Thompson's counsel. The district court found nothing wrong with the amount of hours claimed by Thompson's attorneys, and Defendants do not challenge that determination on appeal. The district court then considered their requested fees, in light of the fees generally awarded in the Eastern District of Louisiana. *See Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 662 (5th Cir. 2002) (noting that "[r]easonable hourly rates are determined by looking to the prevailing market rates in the relevant legal community"). Thompson's Philadelphia-based counsel requested fees from $405–$625 an hour for experienced attorneys, $180–$285 an hour for associates, and $135–$225 an hour for legal and technical assistants.[26] After surveying recent awards in civil rights cases in the district, the district court decided that a reasonable fee would be 50% of the amount that Thompson's counsel sought.

Defendants assert that the highest fee awards in the Eastern District of Louisiana are $260 for an experienced attorney, $150 for a junior attorney, and $75 for a paralegal. At the 50% rate ordered by the district court, experienced attorneys received $202–312 an hour, a mid-level associate received $90–202 an hour, a junior associate received $90–142 an hour, and

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[26] The fees are listed as ranges, as the hourly rates differed among attorneys and increased over the time period covered—2003 to 2007.

the paralegals received $67–112 an hour. Thus, the fees awarded were both above and below the limits argued by Defendants. The district court also noted that Thompson's counsel wrote off 482 hours (approximately $300,000 in attorneys' fees), reduced their normal rates by 10%, and did not seek to recover for local counsel's work. The district court further stated that it was "genuinely impressed" with counsel's work and commended the skill of the attorneys. Although the fees awarded were at the upper range of what was reasonable in the district, given this explanation, we cannot say that there was clear error in calculating the lodestar amount.

We next consider whether the district court abused its discretion in increasing the amount awarded based on its consideration of the *Johnson* factors. The district court listed several factors as part of its decision to increase the attorneys' fees amount under *Johnson*, including the need for out-of-town counsel, the time limitations in place, and the special skill required. Specifically, the district court noted that Thompson's Philadelphia counsel, who had represented him for the past fourteen years, knew the case better than anyone else and were the only ones in a position to file a complaint within the time limits imposed by the statute of limitations. Further, the district court found that successful presentation of the case required exceptional ability on the part of Thompson's counsel because it is extraordinarily difficult to actually obtain a jury verdict for the plaintiff in a civil rights case.

On appeal, Defendants argue that counsel's pro bono representation of Thompson should not warrant an upward adjustment under *Johnson*. The district

court, however, stated that Thompson's counsel would "of course remain uncompensated" for those years of service; thus, there is no merit to Defendants' argument on that point. Defendants also assert that local counsel could have been found to bring Thompson's case in a timely fashion and that the case did not involve new or novel issues. Again, though, as noted by the district court, finding counsel who could bring the suit is not the same as finding counsel who could win the suit. Thompson's attorneys were intimately familiar with the facts of this case and were in the best position to bring Thompson's claims. Under *Johnson*, the skill required, the amount involved and result obtained, the time limitations imposed by the circumstances, and the nature and length of the professional relationship with the client are all factors that may be considered in adjusting a fee award. *Johnson*, 488 F.2d at 717–19. We find no abuse of discretion in the district court's decision to adjust the fee award for these reasons. Consequently, we affirm the attorneys' fees awarded in this case.[27]

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[27] Defendants correctly argue that the district court erred in naming Connick, Dubelier, and Williams in the judgment and abused its discretion by denying their Rule 59(e) motion to alter or amend the judgment to correct this error. We have previously held that it is proper to dismiss allegations against municipal officers in their official capacities when the allegations duplicate claims against the governmental entity itself. *See Castro Romero v. Becken*, 256 F.3d 349, 355 (5th Cir. 2001) (noting that the official-capacity claims were duplicative of the claims against the governmental entities); *cf.* FED. R. CIV. P. 25(d) (providing that when a public officer is sued in his official capacity and the ceases to hold office, his successor is automatically substituted as a party). Because it is undisputed that Connick, Dubelier, and Williams are no longer employed at the DA's Office, their official capacities are non-existent, and they should not have been named

IV. CONCLUSION

Giving due deference to the district court's decision and the jury's verdict, we find no reversible error in this case other than the naming of non-liable parties in the judgment. Therefore, we REVERSE IN PART and REMAND with instructions to remove the non-liable defendants from the judgment. However, we AFFIRM the remainder of the district court's judgment. Costs shall be borne by Defendants.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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in the judgment. Consequently, we reverse the district court's decision to deny Defendants' Rule 59(e) motion and remand with instructions to remove Connick, Dubelier, and Williams from the judgment. We further note that after the briefing of this case was complete, Jordan, who was District Attorney when this case began, resigned his position. Thus, pursuant to Rule 25(d), the district court should substitute the name of the current District Attorney.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 03-2045
SECTION "J" (5)

[Filed November 15, 2005]

JOHN THOMPSON	)
	)
VERSUS	)
	)
HARRY CONNICK, ET AL.	)
	)

ORDER AND REASONS

Before the Court is Defendants' **Motion for Summary Judgment** (Rec. Doc. 39). The motion is opposed. After considering the motion, opposition, and the applicable law, the Court finds that the motion should be GRANTED regarding Plaintiff's state law tort claims, and DENIED as to all other claims.

BACKGROUND

On April 11 and 12, 1985, Plaintiff was prosecuted in Orleans Parish Criminal District Court and convicted of attempted armed robbery. Then, on May 5-8, 1985, Plaintiff was tried, convicted and sentenced to death for First Degree Murder, again in Orleans

Parish Criminal District Court. Plaintiff exhausted his post-conviction relief available in state court and, on February 27, 1997, he filed a habeas corpus action in the United States District Court, Eastern District of Louisiana. After conducting an exhaustive review of the state court pleadings and records available at that time, the district court denied Plaintiff's application for habeas relief. Plaintiff appealed the district court's decision, which was affirmed by the Fifth Circuit.

In April, 1999, the state trial court set Plaintiff's execution date for May 20, 1999. On April 29, 1999, Plaintiff's counsel met with Orleans Parish Assistant District Attorneys and were provided with documents regarding blood evidence in the attempted armed robbery case, which had not been turned over before trial. On May 2, 1999, the District Attorney's Office and Plaintiff's counsel jointly sought a stay of execution. On May 5, 1999 Plaintiff's blood was tested and determined to be different than the blood of the assailant in the armed robbery case. Consequently, the trial court conducted an evidentiary hearing and, on June 29, 1999, the court vacated the attempted armed robbery conviction.

Plaintiff then filed for additional post-conviction relief with respect to his murder conviction. On October 26, 2000, the trial court conducted a hearing and reversed Plaintiff's death sentence, but did not award him a new murder trial. Plaintiff appealed and, on July 17, 2002, the Louisiana Fourth Circuit Court of Appeal reversed Plaintiff's conviction and sentence and remanded the case for a new trial. A new murder trial was conducted in May of 2003, which resulted in Plaintiff's acquittal of the murder charges.

On July 16, 2003, Plaintiff filed the above-captioned lawsuit under 42 U.S.C. §§ 1983, 1985 and 1986 against the defendants, Harry Connick, Eric Dubelier, James Williams, Eddie Jordan, and the Orleans Parish District Attorney's Office (collectively "the DA Defendants"). Plaintiff also named Jane and John Does 1 to 25 and ABC Insurance Companies 1 through 10. Plaintiff has asserted claims of malicious prosecution, intentional and/or reckless infliction of emotional distress, and deprivation of his constitutional and civil rights. Arguing that they are entitled to summary judgment, the DA Defendants filed the present motion.

LAW

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Little Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (citing Fed. R. Civ. Pro. 56(c)). The moving party bears the initial burden of demonstrating to the court that there is an absence of genuine factual issues. Topalian v. Ehrmann, 954 F.2d 1125, 1132 (5th Cir. 1992). Once the movant meets that burden, the non-moving party must produce evidence sufficient to establish that there is a genuine issue of material fact in dispute. Id. Accordingly, a factual controversy exists when both parties have submitted evidence of contradictory facts. Little, 37 F.3d at 1075. On summary judgment, factual controversies are resolved in favor of the non-moving party. Id.

DISCUSSION

In the summary judgment motion presently before the Court, Defendants argue that they are entitled to summary judgment because (A) Plaintiff's claims arising from the armed robbery conviction have prescribed, (B) the numerous prior decisions pertaining to Plaintiff's claims of prosecutorial misconduct and impropriety have a collateral estoppel and/or res judicata effect on this matter, (C) the individual Defendant, Connick, has absolute and/or qualified immunity from the federal claims, (D) Plaintiff is unable to prove essential elements of his claims, and (E) all Defendants have immunity from the State law claims. Each of the Defendants' contentions are addressed below.

A. Prescription of Plaintiff's Claims Arising from the Armed Robbery Conviction

In Heck v. Humphrey, 512 U.S. 477, 486 (1994), the United States Supreme Court held that a section 1983 plaintiff seeking to recover money damages for an allegedly unconstitutional or unlawful conviction, in which the alleged unlawfulness would render the conviction invalid, must prove that the conviction has either been reversed on appeal or called into question by the issuance of a writ of habeas corpus. The Heck Court's holding grew out of a concern that a prisoner should not be permitted to collaterally attack a conviction by the means of a civil suit brought under section 1983. Id. at 482.

> Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff

> would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 487. In other words, there is a proscription against allowing a civil tort suit to cast doubt on a criminal conviction. However, when no conflict exists between the conviction and the claims involved in the civil complaint, the section 1983 suit should be allowed to proceed. Id.

The DA Defendants assert that Plaintiff's allegations with respect to the armed robbery conviction began to run from the time Plaintiff's armed robbery conviction was reversed, not from the time his murder conviction was reversed. The DA Defendants contend that the armed robbery conviction was not in any way related to the murder conviction. Plaintiff argues that the alleged prosecutorial misconduct in the armed robbery proceeding was used by the prosecutors in the murder case. Specifically, Plaintiff alleges that the prosecutors sought to have the armed robbery trial held first in order to prevent Plaintiff from taking the stand in his own defense at the murder trial. Further, Plaintiff contends that the prosecutors had an independent and continuing duty to produce exculpatory blood evidence in the murder case.

The question becomes whether the improper conduct which ultimately resulted in Plaintiff's conviction for attempted armed robbery had sufficient bearing on his conviction for murder. If so, under Heck Plaintiff could not bring a civil action challenging the DA Defendants' conduct until his murder conviction had been invalidated. Had Plaintiff filed a civil suit under section 1983 for constitutional violations in his armed robbery prosecution, he would have been implying, by way of a civil suit, that his murder conviction was invalid.

A determination that the armed robbery conviction was used to influence the proceedings in the murder trial has already been made by the Louisiana Fourth Circuit Court of Appeal. As explained the by Fourth Circuit in State v. Thompson, 2002-0361 (La. App. 4 Cir. 7/17/02), 825 So. 2d 552, 557, Plaintiff

> was denied his right to testify in his own behalf [in the murder trial] based upon the improper actions of the State in the [armed robbery] case. Indeed, the [Plaintiff's] case is more egregious in that it was the State's intentional hiding of exculpatory evidence in the armed robbery case that led to his improper conviction in that case and his subsequent decision not to testify in the [murder] case because of the improper conviction.

Thus, the alleged improper conduct on the part of the DA Defendants in the armed robbery case is related to the murder conviction. Consequently, Plaintiff's section 1983 suit regarding the murder trial was not ripe under Heck until July 17, 2002, the day the appellate court reversed his murder conviction.

Therefore, the DA Defendants' argument based on prescription fails.

B. Res Judicata and/or Collateral Estoppel

According to the Fifth Circuit, res judicata applies where "(1) the parties to both actions are identical (or at least in privity); (2) the judgment in the first action is rendered by a court of competent jurisdiction; (3) the first action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits." Procter & Gamble Co. v. Amway Corp., 376 F.3d 496, 499 (5th Cir. 2004). If all four of these conditions are satisfied, all claims or defenses arising from a "common nucleus of operative facts" are merged or extinguished. Id. Under federal law, "the doctrine of collateral estoppel has three requirements: (1) the prior federal decision resulted in a judgment on the merits; (2) the same fact issue must have been *actually litigated in the federal court;* and (3) the disposition of that issue must have been necessary to the outcome of the prior federal litigation." American Home Assur. Co. v. Chevron, USA, Inc., 400 F.3d 265, 272 (5th Cir. 2005). Further, Louisiana law also limits the doctrine of collateral estoppel to issues actually litigated in a prior proceeding. Id.

The DA Defendants contend that the doctrine of res judicata, or alternatively collateral estoppel, acts to merge the treatment of the present claims, which arise out of the same nucleus of operative fact as the prior claims, with the judgment of those prior claims. Plaintiff argues that the significant Brady material revealed after 1999 was not available to the reviewing courts. Therefore, Plaintiff did not have a full and fair

opportunity to litigate the issues in the prior pleadings.

The Complaint in the present lawsuit involves claims distinct from those asserted in Plaintiff's post conviction criminal case. Further, considering the facts in a light most favorable to the Plaintiff, the same fact issues could not have been "actually litigated in federal court" because Plaintiff did not discover them until after the district and appellate courts had ruled on his habeas petition. Accordingly, the doctrines of res judicata and collateral estoppel do not apply to the instant matter.

C. Individual Liability of Connick

Defendant Connick is sued in his individual capacity as well as his official capacity. Connick seeks summary judgment denying the individual claims based on immunity and on Plaintiff's inability to prove essential elements of the claims.

1. Absolute Immunity

In order to determine whether Connick is entitled to absolute immunity this Court must undertake a functional analysis to determine whether the actions complained of were within the quasi-judicial prosecutorial role. See, Burns v. Reed, 500 U.S. 478, 486 (1991). As an official seeking absolute immunity, Connick "bears the burden of showing that such immunity is justified for the function in question. . . . The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." Id. (citing Forrester v. White, 484 U.S. 292, 224 (1988); Malley v. Briggs, 475

U.S. 335, 340 (1986); Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982); Butz v. Economou, 438 U.S. 478, 506 (1978)). As a result, "state prosecutors are not entitled to absolute immunity when they perform functions other than their quasi-judicial functions of 'initiating prosecutions and presenting the State's case.'" Marrero v. City of Hialeah, 625 F.2d 499, 507 (5th Cir. 1980) (quoting Imbler v. Pachtman, 424 U.S. 409, 431 (1976)). The first step in the functional analysis is to "isolate the particular prosecutorial conduct of which [plaintiff] complain[s]." Id. at 505. The second step is to determine whether the conduct falls under the "Imbler umbrella" protecting the quasi-judicial activity of the prosecutor as an advocate for the State. Id.

The complaint against Connick in his individual capacity is that he trained his assistants to disregard their constitutional duties, or that he failed to train and supervise them adequately, despite the obvious need. See, Complaint (Rec. Doc. 1) ¶¶ 131-32. Thus, the conduct complained of took place (or failed to take place) not in relation to the prosecution of any particular case for the State, but in running the District Attorney's Office as an administrator and supervisor. The Supreme Court in Imbler recognized the possible difficulty in distinguishing prosecutorial conduct as an advocate from conduct as an administrator where the conduct takes place before initiating prosecution or outside of the court room, Imbler, 424 U.S. at 430 n.33. This case, however, presents little difficulty. Imbler offers an illustrative list of the types of activities that could lead to a gray area between advocacy and administration.

> A prosecuting attorney is required constantly, in the course of his duty as such, to make

> decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.

Id. The list demonstrates that the borderline activities are those made outside court or before prosecution, in relation to a case, or, as the Court stated elsewhere in the opinion, "both in deciding which suits to bring and conducting them in court." Id. at 424. Connick has failed to meet his burden of establishing that decisions regarding training and supervision as a general policy matter, rather than decisions pertaining to the initiation and presentation of individual cases, fall within the ambit of this list, and so are "intimately associated with the judicial phase of the criminal process," Imbler, 424 U.S. at 430. Accord, Carter v. City of Philadelphia, 181 F.3d 339, 353 (3d Cir. 1999) (holding that "local policies relating to training, supervision and discipline, rather than decisions about whether and how to prosecute violations of state law" are administrative rather than prosecutorial). Connick has failed to present, and this Court fails to see, any argument for regarding the

complained of conduct as advocacy rather than administration.[1]

This determination is bolstered by reference to the justifications for prosecutorial absolute immunity. These are: 1) concern that subjecting the prosecutor to personal liability would interfere with the effective functioning of the criminal judicial system to the extent that the prosecutor plays an integral role in the judicial process, and 2) that "'the safeguards built into the judicial system tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct.'" Marrero, 625 F.2d at 508-09 (quoting Butz v. Economou, 98 S.Ct. 2894, 2914 (1978).

The first justification, that prosecutors will hold back on prosecuting for fear of a retaliatory or burdensome private suit, see, id., does not apply here.

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[1] See also, King v. Timmoney, 2003 WL 21246490 (E.D. Pa., 2003) (Absolute immunity does not extend to allegations that district attorney's office failed to establish proper training, supervision and discipline policies which would reduce likelihood that false information would be introduced as evidence at trial.); McClendon v. May, 37 F. Supp. 2d 1371 (S.D. Ga. 1999) (considering district attorney's failure to train as within scope of discretionary activity, and subject to qualified immunity); Barbera v. Smith, 654 F.Supp. 386 (S.D.N.Y., 1987) (United States Attorney was not protected by absolute immunity in connection with alleged failure to provide assistant with training and supervision, resulting in murder of government informant who had been denied protection.). Connick's reference to numerous cases where absolute immunity applied to the suppression of Brady material is off point. The conduct complained of in the individual capacity action was the training and supervision of assistants, not the suppression of Brady material by those assistants.

Being subject to liability for unconstitutional training and supervision of the District Attorney's Office as a matter of general policy in no way interferes in the prosecutor's quasi-judicial role of "deciding which suits to bring and conducting them in court." Id. at 508 (quoting Imbler, 424 U.S. at 424). The Fifth Circuit has made clear that "'the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process. . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.'" Hughes v. Tarrant County Texas, 948 F.2d 918, 922 (5th Cir. 1991) (quoting Burns, 500 U.S. at 494.)

Neither does the second justification apply. Absent a private action challenging it, any possible unconstitutionality of Connick's conduct in training and supervising would never be subject to "the watchful eye of the judge" as conduct in court would, nor to the rigorous testing of the adversary process. See, Marrero, 625 F.2d at 509. Training and supervising the office, not in relation to a particular prosecution, but as a matter of policy, is simply not subject to the judicial safeguards that justify absolute immunity.

Because absolute immunity in this situation fulfills neither of the justifications for its existence, because Connick has failed to come forward with an argument that promulgating training policy is quasi-judicial, and in light of the presumption against absolute immunity

in favor of qualified immunity, this Court cannot dismiss Plaintiff's claims based on absolute immunity.

2. Qualified Immunity

To the extent that Connick is authorized, as part of his discretionary duties, to create and maintain policy on training and supervision, he is entitled to assert a qualified immunity defense in section 1983 actions challenging those policies. See, id. A defendant asserts qualified immunity by pleading his good faith and establishing that he was acting within the scope of his authority. Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992). Upon properly pleading qualified immunity, the burden shifts to the plaintiff to establish that the official's conduct violated clearly established law. Id. (citing Whatley v. Philo, 817 F.2d 19, 20 (5th Cir. 1987)). The question of whether qualified immunity applies is a purely legal question. Hare v. City of Corinth, 135 F.3d 320, 325 (5th Cir. 1998) (quoting Siegert v. Gilley, 500 U.S. 226, 232 (1991)). The issues and standards of a qualified immunity defense are distinct from those of the merits of a section 1983 individual liability claim. See, Thompson v. Upshur County, 245 F.3d 447, 459-60 (5th Cir. 2001). (explaining the difference between the two standards and how they are often confused).

Connick pleaded that he was a prosecutor and acted in good faith. See, Defs' Answer (Rec. Doc. 11), 2nd Defense. Therefore, the burden is upon Plaintiff to establish that the defense is not available. See, Thompson, 245 F.3d at 457. The first step in the qualified immunity analysis is to determine whether plaintiff has alleged violation of a clearly established federal constitutional right. The second step is to

determine whether defendant's conduct was objectively reasonable in light of the clearly established law at the time of the conduct. Id.

Plaintiff has alleged that the prosecutors violated his Fourteenth Amendment right to Due Process by failing to turn over Brady evidence.[2] See, Brady v. Maryland, 373 U.S. 83, 86 (1963). The right to have evidence beneficial to the criminal defendant turned over by the prosecution upon request is clearly established. See, id.

Connick's conduct is to be held reasonable "unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." Thompson, 245 F.3d at 457 (emphasis in original). Plaintiff has alleged that Connick ordered his assistants to conduct their investigations and prosecutions without regard for the constitutional duties imposed by Brady. See, Complaint (Rec. Doc. 1) ¶ 131. Plaintiff has alleged in addition that Connick failed to train and supervise his assistants as to what Brady requires despite the obvious need for training. *Id.* at ¶ 132. The legal issue before this Court is whether *all* reasonable district attorneys would have realized at the time of this prosecution that it violated the federal Constitution to compel assistant district attorneys to disregard Brady requirements or to fail to

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[2] Plaintiff also alleges violation of rights guaranteed by the 4th, 5th, 6th, and 8th amendments. Complaint ¶ 135. To the extent that these amendments apply to the states, it is through the 14th amendment's due process clause. See, 16A Am. Jur. 2d Constitutional Law § 404 (Thompson /West 2005).

train them as to its requirements in the face of an obvious need for training. Considering the fact that Brady had been established precedent for twenty years, this Court finds that all district attorneys would so have realized, and that the conduct alleged by plaintiff is objectively unreasonable in light of clearly established law. Therefore, defendant Connick may not rely on qualified immunity to dismiss the individual claims against him.

3. The Merits of the Individual Supervisory Liability Claim Under Section 1983

Although Defendants' arguments somewhat confuse qualified immunity with failure to raise a triable issue on the merits, it seems clear from the legal memoranda that Connick seeks summary judgment on the basis of both.[3]

"'Under section 1983, supervisory officials are not liable for the actions of subordinates on any theory of vicarious liability. However, a supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation'" Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987) (citations omitted)). Plaintiff has not alleged that Connick was personally involved in Plaintiff's constitutional deprivation. To show "a sufficient causal

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[3] Cousin v. Small, 325 F.3d 627, 637-38 (5th Cir. 2003), heavily relied on by Defendants, also jumps this analytical track between immunity and the merits of the claim. As noted above, it is a common mistake.

connection" despite this, Plaintiff must demonstrate that "(1) the supervisor failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." Smith v. Brenoettsy, 158 F.3d 908, 911-12 (5th Cir. 1998). "For an official to act with deliberate indifference, 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994)). Resolving all factual controversies in favor of the non-moving party, this Court finds that Plaintiff has raised genuine issues of material fact with respect to each of these elements.

a. Did Connick Fail to Train?

Connick presents evidence in the form of an affidavit that informal training on Brady matters was periodically held in the office during the relevant period. See, Connick Aff. at ¶ 9. The record contains other evidence that the assistant district attorneys did receive training.[4] To raise a fact issue, Plaintiff presents evidence in the form of deposition testimony

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[4] See, Connick Depo., at 27: 9-11 ("We had ongoing training sessions in-house and out of house."); Dubelier Depo., at 71:8-10 ("I don't recall specifically any training. I'm sure there was training. I just can't remember."); Solino Depo., at 233: 10-16 ("I vividly remember training sessions. . . . And there was no doubt in anybody's mind what their responsibility was to turn over exculpatory evidence."); McElroy Depo., at 116: 3-5 ("All of what I have discussed with you in terms of lessons, instructions, all were occurring during this time period.").

of the assistant district attorneys who prosecuted Plaintiff that they received "on-the-job" training by trying "not to make the same mistake twice," Williams's Depo. at 99:3-10, and "on-the-job" training "learning as we go," Dubelier Depo. at 72:3-10.[5] Neither party's evidence is conclusive of the issue of whether or how Connick trained his assistants regarding *Brady* materials.

b. Was There A Causal Link?

Connick argues that because no amount of training or supervision can ensure that Brady violations do not occur, Plaintiff cannot demonstrate the second element, a causal link. Def's Support Memo at 19. Connick points to no case law requiring such strict causation. Plaintiff indicates a list of Brady evidence that was not produced. Decisions subsequent to Plaintiff's prosecution have confirmed that this material should have been produced and, in fact, that the material exculpated Plaintiff. See, Complaint ¶¶ 62-71. This Court finds that, considering the evidence of inadequate training and supervision in the light most favorable to the plaintiff, a material issue exists as to whether a proper policy of training and supervision would have prevented some or all of the violations of Plaintiff's constitutional rights.

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[5] See also, Glas Depo., at 49:11-15, 50:21-25 ("I don't know that I remember any formal trainings. . . I think it was mainly on-the-job training."); Whittaker Depo., at 158:1-3, 159:1-5 ("I don't recall ever being schooled on policies regarding evidence, how to handle things like that. . . . I don't recall there ever being training on that. I don't recall there being training period. It was pretty much on-the-job- training.")

c. Was There Deliberate Indifference?

To establish deliberate indifference sufficient to support individual liability, Plaintiff must present evidence that Connick not only knew enough facts to infer the risk of constitutional violations, but also that he actually made the inference. Smith, 158 F.3d at 911-12. The record indicates that facts existed that would allow Connick to infer a substantial risk of Brady violations and that Connick in fact made the inference. Connick's own affidavit demonstrates that there were from 30 to 90 assistant district attorneys in his office screening between 12,000 and 17,000 charges a year and prosecuting approximately half of these, and that "it is often difficult for prosecutors as well as trial and appellate judges to distinguish that which is Brady." Connick Aff. ¶¶ 3, 4, 13. At the time Plaintiff's case was prosecuted, no formal policy on Brady had been promulgated, but within two years a policy manual was created to explain to assistants the office's policy. Id. ¶ 6. According to Connick, training was informal at the time Plaintiff was prosecuted, but within two years Connick established formal training classes at least once a year (some of which, he indicates, included Brady instruction). Id. ¶ 9. Interpreting this testimony in the light most favorable to Plaintiff, a jury could find that Connick had inferred that there was a substantial risk of Brady violations. Yet, Plaintiff has offered the deposition evidence cited above indicating that, at the time Plaintiff was prosecuted, training on the matter was minimal to non-existent. Thus, a genuine issue exists as to whether Connick exhibited deliberate indifference in failing to train or supervise his assistants.

Because genuine issues of material fact exist as to each element of Plaintiff's section 1983 claim against Connick in his individual capacity, Connick's motion for summary judgment cannot be granted.

D. Monell Liability of the District Attorney's Office

Plaintiff has named as defendants Harry Connick, Eric Dubelier, James Williams, and Eddie Jordan in their official capacities. The claims against Defendants in their official capacities are, in effect, claims against the District Attorney's ("DA's") office as an entity. Kentucky v. Graham, 473 U.S. 159, 165 (1985). Immunity defenses available to defendants sued in their individual capacities are not available to an entity. Id. Only sovereign immunity that the entity could claim as an entity, such as Eleventh Amendment immunity, is available. Id. DA's offices in Louisiana are local government entities not entitled to Eleventh Amendment immunity. Burge v. Parish of Tangipahoa, 187 F.3d 452, 466 (5th Cir. 1999).

An entity may only be held liable under section 1983 for the constitutional torts of its agents when an official policy of the entity itself caused the deprivation of plaintiff's rights. Pembaur v. City of Cincinnati, 475 U.S. 469, 477-78 (1986) (quoting Monell v. Department of Social Services, 436 U.S. 658, 691 (1978)). The "official policy" requirement serves to distinguish acts of the entity from acts of its employees. Id. 479-80. Only the former are actionable. Three methods of establishing "official policy" have developed since Monell. These are: (1) where the appropriate officer promulgates a generally applicable statement of policy and the act complained of is simply an implementation

of that policy; (2) where no rule has been announced as "policy" but the act of the policymaker itself violated federal law, such that policy and implementation are one; and (3) where the official policymaker has failed to act at all when the need is so obvious and the failure to act so likely to result in violation that the failure to act rises to a deliberate indifference tantamount to intent. Board of County Com'rs v. Brown, 520 U.S. 397, 418-19 (1997). Plaintiff's complaint alleges, alternatively and cumulatively, all three grounds for finding that the DA's office caused Plaintiff's rights to be violated. See, Complaint, (Rec. Doc. 1) ¶¶ 123-38.

1. Implementation of Promulgated Official Policy

Plaintiff alleges that the DA's office had "maintained an official policy, practice, and/or custom of ordering and compelling assistant district attorneys of [the DA's office] to proceed with and maintain the investigation and prosecution of Plaintiff without concern for his constitutional rights." Id. ¶ 131. The DA's office seeks summary judgment on this allegation based on evidence that, in fact, the DA's office's policy at all times was that assistants were to comply with the requirements of Brady and that no policy of withholding Brady evidence ever existed. See, e.g., Connick Aff. ¶¶ 7, 14; Dubelier Aff. ¶¶ 8-10; Williams Aff. ¶¶ 8-10, 13. In response, Plaintiff attempts to raise an issue of material fact regarding a generally applicable policy of non-production, which assistants Dubelier and Williams were simply implementing. Plaintiff does this by reference to deposition testimony indicating that Supplemental Police Reports and witness statements were rarely, if ever, turned over. See, Whittaker Depo. at 163-64; Williams Depo., Vol.

I, at 97, 103-04, 170-71. However, each of these deponents was clear that he understood that he should produce the minimum materials required by law. See, Dubelier Depo., at 76-79; Williams Depo., Vol. II, at 359; see, also, Glas Depo., at 52; Whittaker Depo. at 160-61.

This evidence bolsters the DA's office's version of the policy in place. The contention that assistant district attorneys were deciding for themselves what constituted Brady material supports the claims that they were themselves policymakers and/or that they were not trained. It does not necessarily point to a generally applicable official policy of withholding Brady material. The record, taken as a whole, tends to foreclose the possibility that a reasonable trier of fact could find that the DA's office promulgated an official policy of non-production of Brady materials, which Williams and Dubelier implemented in prosecuting Plaintiff. However, the Court need not rule on this particular basis for official liability because, as discussed below, Plaintiff can defeat summary judgment by relying on the other bases.

2. Violation by the Policymaker

In the absence of an official policy, the official policymaker's own violation of the law creates entity liability. Plaintiff does not claim that Connick withheld Brady material, but he does claim that assistants Dubelier and/or Williams were delegated final policymaking authority such that their failure to produce Brady material creates liability for the DA's office.

Entity liability may be established by a single act of a final policy maker. Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority" Id. at 483. However, de facto policymaking authority is not enough. City of St. Louis v. Praprotnik, 485 U.S. 112, 131 (1988) (plurality opinion); see also, Flores v. Cameron County, 92 F.3d 258, 269-70 (5th Cir. 1996). Plaintiff must show that the official policymaker actually delegated final policymaking authority to his officers. See, Jett v. Dallas Ind. Sch. Dist., 7 F.3d 1241, 1251 (5th Cir. 1993).

In Louisiana, by legislative enactment a district attorney is the independent and final official policymaker for all prosecutorial and administrative functions of the DA's office. See, Burge v. Parish of St. Tammany, 187 F.3d 452, 469 (5th Cir. 1999). Therefore, if the district attorney delegated the final policymaking authority to his assistants to set forth the nature of Brady, then the violations of Brady's requirements by those assistants would subject the DA's office to section 1983 liability. That the district attorney may delegate final policymaking authority under Louisiana state law seems clear. See, La. Const. Art. 5 § 26(B) ("[A] district attorney, *or his designated assistant*, shall have charge of every criminal prosecution by the state in his district") (emphasis added); La. R.S. 16:1(C) (same, specific to Parish of Orleans). See, also, Mairena v. Foti, 816 F.2d 1061, 1065 (5th Cir. 1987) (finding that the trial division chief under the district attorney was himself delegating policymaking authority to lower level assistants for purposes of section 1983 liability).

The DA's office contends that because the district attorney, Connick, established the DA's office's policy on Brady, which Williams and Dubelier were simply following, they cannot be considered final policymakers responsible for setting forth the nature of Brady. See, Def. Reply at 18. Connick testified that the only policy regarding Brady in the DA's office was that later formalized in Section 5.25 of the Policy Manual. Connick Aff. ¶ 7. Section 5.25 reads:

> 5.25 PRE-TRIAL – BRADY MATERIAL
>
> > In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called Brady material - -- that is, information in the possession of the State which is exculpatory regarding defendant. The duty to produce Brady material is ongoing and continues throughout the entirety of the trial. Failure to produce Brady material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of Brady issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State.

Id. Ex. A.

Plaintiff has adduced evidence that there was no written Brady policy at the time of the prosecution and perhaps no policy at all that was communicated to the assistants. See, § C.3.a. supra. Plaintiff argues that

even if section 5.25 does reflect the policy of the office at the time, it offers no guidance on the substance of prosecutors' duties under Brady. See, Pl.'s Opp. at 32. Plaintiff has adduced evidence that Williams and Dubelier were not required to receive pre-trial supervision. See, Solino Depo. at 67, 72. Finally, Plaintiff argues that the policy as later formalized in section 5.25 is an incorrect statement of the duties of a prosecutor under Brady in that it limits Brady material to exculpatory material. Pl.'s Opp. at 14.

A genuine issue of material fact exists as to just what the DA's policy on Brady materials was at the time of Plaintiff's prosecution. In addition, this Court finds that the DA's contention that Williams and Dubelier were simply following the policy later set forth in section 5.25 glosses over the level of generality of the "final" policy. When coupled with Plaintiff's evidence of a lack of training and supervision (considered true for purposes of this motion), the policy amounts to little more than "obey the law as you understand it." Indeed, the deponents testified that this was their understanding of the DA's policy. See, Dubelier Depo., at 76-79; Williams Depo., Vol. II, at 359; see, also, Glas Depo., at 52; Whittaker Depo. at 160-61. Under this scenario, the policy is itself an actual delegation of policymaking authority to those implementing it. The assistant DA's were authorized to create the office's policy on the nature of Brady duties. As noted above, a single act by a policymaker can subject the entity to section 1983 liability. "[A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it

surely represents an act of official government 'policy' as that term is commonly understood." Pembaur, 475 U.S. at 481. Considering the foregoing, Plaintiff has raised sufficient material fact issues about whether Williams and Dubelier were final policymakers to survive summary judgment.

3. Failure to Act Rising to the Level of Deliberate Indifference

Where the need to act and the likelihood of violation from inaction are exceedingly obvious, the official policymaker's "deliberately indifferent" failure to act creates entity liability. The deliberately indifferent standard is more stringent than any form of negligence; rather it is "a lesser form of intent." Doe v. Taylor Independent School Dist., 15 F.3d 443, 453 n.7 (5th Cir. 1994) (en banc). The "deliberately indifferent" standard for entity liability as followed in this circuit was established in City of Canton v. Harris, 489 U.S. 378 (1989), and is basically the same as the standard for individual liability. See, Doe v. Taylor Ind. School Dist., 15 F.3d at 453-54. "Proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights is normally required before such lack of training or supervision constitutes deliberate indifference." Thompson, 245 F.3d at 459. However, "[s]uch a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference." Board of County Com'rs v. Brown, 520 U.S. at 418 (citing City of Canton, 489 U.S. at 390 n.10); see also, Grandstaff v. City of Borger, 767 F.2d 161 (1985) (finding a single egregious violation with no corrective measures

afterward sufficient to support knowledge and acquiescence by the policymaker) abrogated on other grounds by, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 167 (1993).

In Canton, the Supreme Court gave the following example of the level of obviousness needed to establish deliberate indifference absent a pattern: "For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." City of Canton, 489 U.S. at 390 n.10 (citation omitted).

Plaintiff presents the following evidence to support his claim of deliberate indifference:

1) that the DA's office knows that Brady issues are complex and ambiguous;

2) that the DA's office had no written policy manual addressing Brady or other issues despite an ABA standard calling for such a manual;

3) that the DA's office cannot produce or identify any written guidance on Brady compliance from the period of plaintiff's prosecution;

4) that the later-written policy identified by the DA's office mistakenly limits Brady material to

"information that is exculpatory regarding the defendant";

5) that the later-written policy manual gives little guidance on complying with Brady;

6) that no deponent could identify any training sessions on Brady;

7) that several deponents conceded that they were not formally trained, and that no one in the office received formal training;

8) that Judge Calvin Johnson of the Criminal District Court for the Parish of Orleans felt it necessary to write a letter of concern to the DA's office regarding the failure to turn over Brady material;

9) that numerous cases have established Brady violations by the DA's office; and

10) that the DA's office was unable to identify any corrective measures taken in response to Brady violations identified by the courts.

Defendants argue that the Fifth Circuit's decision Cousin v. Small, 325 F.3d 627, 637-38 (5th Cir. 2003), forecloses Plaintiff's section 1983 claim. In Cousin, the Court of Appeal upheld the district court's finding that citation to a small number of cases involving Brady violations out of the "tens of thousands" of cases handled by the DA's office over the period was insufficient to raise a triable issue of fact with respect to deliberate indifference. Id. Defendants argue that Cousin upholds a district court adjudication "fully analyzing the entire breadth of Connick's term in the

OPDA and finding no pattern, no custom, no failure to train or supervise." Def.'s Reply at 11.

This Court does not read Cousin so expansively as having decided as a matter of law that the DA's office was not deliberately indifferent during Connick's entire term with respect to training and supervision regarding Brady duties. Unlike in Cousin, Plaintiff in this case does not attempt to establish a de facto pattern by way of a statistical analysis of Brady reversals.[6] Although the numerous cases where courts have found Brady violations clearly constitute "proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights," Thompson, 245 F.3d at 459, they may or may not establish a "pattern." However, as demonstrated in Canton, a pattern is not necessarily required when the need to train and supervise is "so obvious."

Following Canton's "so obvious" standard, and viewing the evidence in the light most favorable to plaintiff, the DA's office knew to a moral certainty that assistants would acquire Brady material, that without training it is not always obvious what Brady requires, and that withholding Brady material will virtually always lead to a substantial violation of constitutional rights. A reasonable jury could find that the need for

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[6] Defendants do offer the statistic that six additional cases pointed out by Plaintiff only raise the frequency of possible Brady reversals during the 25 year period 0.2%. Def.'s Reply at 13. The statistic is, of course, meaningless in that the number of reversals does not indicate the number of violations or, as the Fifth Circuit pointed out, deliberate indifference. This Court cannot rely on inexpert statistical analysis that does little more than divide one incidental number by another.

training in this situation is so obvious that the failure to offer it could properly be characterized as "deliberate indifference," which caused plaintiff's injury. Compare, Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992) (applying the same analysis to reach the same conclusion).

E. STATE LAW CLAIMS

1. Malicious Prosecution

The elements for malicious prosecution are: "(1) the commencement or continuance of an original criminal or civil proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for the original proceeding; (5) the presence of malice therein; and (6) damage resulting to the plaintiff." Plessy v. Hayes Motor Co., Inc., 742 So. 2d 934, 938 (La. App. 2 Cir. 1999). As indicated by the first element, Plaintiff's claim for malicious prosecution concerns the commencement of the prosecution against him, not an action for failure to train or supervise, or for a "malicious" policy. In Knapper v. Connick, 681 So. 2d 944, 950 (1996), the Supreme Court of Louisiana held that prosecutors are absolutely immune from liability for actions that "fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process." The Court followed Buckley's functional analysis to determine the scope of the immunity. Id. The conduct of Defendants in "the commencement or continuance" of Plaintiff's prosecution falls squarely within the traditional role of a prosecutor as advocate for the state. Therefore

Defendants are immune under Louisiana law, and summary judgment dismissing this claim is appropriate.

2. Intentional Infliction of Emotional Distress

The elements for Intentional Infliction of Emotional Distress are: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by plaintiff was severe; and (3) that the defendant knew that severe emotional distress would be certain or substantially certain to result from his conduct. Darden v. Smith, 879 So. 2d 390 (La. App. 3 Cir. 2004). Plaintiff seeks damages for this tort in connection with the Defendants' conduct in prosecuting Plaintiff. See, Pl. Complaint ¶¶ 116-22. As explained above, Louisiana grants absolute immunity for prosecutorial advocacy.

CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Rec. Doc. 39) is **GRANTED IN PART** regarding the Plaintiff's State law claims of Malicious Prosecution and Intentional Infliction of Emotional Distress.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Rec. Doc. 39) is **DENIED IN PART** regarding the remainder of Plaintiff's claims.

New Orleans, Louisiana, this 15th day of November, 2005.

/s/ Carl J. Barbier
CARL J. BARBIER
UNITED STATES DISTRICT COURT

OPPOSITION BRIEF

No. 09-571

In The

Supreme Court of the United States

HARRY F. CONNICK, District Attorney, et al.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether, viewed in the light most favorable to the jury's verdict in this municipal-liability case, there was sufficient evidence for a reasonable jury to conclude that the district attorney's deliberately indifferent failure to train, monitor or supervise his prosecutors regarding their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), substantially caused the violation of respondent's constitutional rights.

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STATEMENT

Petitioners seek to overturn a civil jury verdict for respondent John Thompson in this municipal-liability case against the Orleans Parish District Attorney's Office, arising from eighteen years of wrongful imprisonment and numerous near executions for a murder he did not commit. After a unanimous panel of the Fifth Circuit affirmed the verdict in Thompson's favor, petitioners sought rehearing *en banc*, which was granted. The grant of rehearing vacated the unanimous panel opinion. Pet. App. 1a.

By reason of an equally divided 8-8 vote, the *en banc* court entered a *per curiam* order affirming the jury verdict. *Ibid.* That *per curiam* order is not precedential. Pet. App. 8a (Jolly, J., specially concurring) (observing that "there is no majority opinion, and that no opinion today will bind any court or future party in this circuit"). Moreover, a review of the principal separate opinions reveals, at most, divergent views of the specific evidence presented in this particular case. Petitioners nonetheless seek this Court's review. Because the questions presented are fact-bound, splitless, unlikely to recur, and essentially ask this Court to reweigh the evidence presented to the jury, the petition should be denied.

I. FACTUAL BACKGROUND

In December 1984, Raymond T. Liuzza, Jr., was killed outside his home in New Orleans. Three weeks later, a college student, Jay LaGarde, and his two

younger siblings were victims of an attempted armed robbery in their car.

In mid-January 1985, respondent John Thompson and a co-defendant, Kevin Freeman, were arrested and charged with Mr. Liuzza's murder. The next day, the New Orleans newspaper ran a front-page photograph of Thompson, identifying him as a suspect in the murder. The father of the LaGardes showed the photograph to two of his children, who said that Thompson might have been their attacker. The father contacted the district attorney's office, and Thompson was charged with the armed robbery in addition to the murder.

Eric Dubelier and James Williams were prosecutors in both the murder and robbery cases. According to the stipulated facts in this civil litigation, Dubelier and Williams "decided to use the armed robbery charge to the State's advantage in the murder case." See Single Listing of All Uncontested Material Facts ("Stip.") ¶ G. Dubelier "decided that a conviction of Thompson on the armed robbery charge would effectively preclude Mr. Thompson from taking the witness stand in his own defense at the murder trial, and that the armed robbery conviction could be used in the penalty phase of the murder trial to obtain a death sentence." *Ibid.* Dubelier and Williams "moved to reverse the order of the trials, so that the armed robbery trial would be held approximately three weeks before the murder trial." *Ibid.* Based solely on the purported eyewitness identifications, Thompson was tried on the armed robbery charge, convicted,

and sentenced to 49½ years in prison without the possibility of parole.

It is now known that shortly before the armed robbery trial, the prosecutors sent to the crime laboratory a bloody swatch from Jay LaGarde's pants containing the perpetrator's blood. A crime lab report addressed to prosecutor Bruce Whittaker revealed that the swatch contained type "B" blood. John Thompson has type "O" blood, although it is not clear whether or not the prosecutors knew Thompson's blood type at the time. Whittaker placed the crime lab report conspicuously on Williams's desk two days before the robbery trial. Williams has admitted that he knew there was blood evidence, and that he steered witnesses away from mentioning it at the armed robbery trial.

The existence of blood evidence was mentioned on the internal and unproduced screening form that Whittaker prepared in the armed robbery case. The form indicated that the prosecutors "may wish" to have respondent's blood tested. Blood evidence was also mentioned in the internal crime scene technician report that was prepared when the bloody swatch was cut from Jay LaGarde's pants. Although no fewer than four prosecutors—Dubelier, Williams, Whittaker and Gerald Deegan—knew of blood evidence, Thompson and his attorneys were never told about or provided with the blood evidence or any of the documents that referred to the collection or testing of that evidence. As a result, the defense was unaware

that the prosecutors had scientific evidence that exonerated Thompson of the armed robbery charge.

Thompson's attorneys submitted a pre-trial motion in the murder case to preclude prosecutors from using the armed robbery conviction while that conviction was on appeal. Because defense counsel did not know of the exonerating blood evidence at that time, the appeal focused on the process used to identify Thompson as the supposed armed robber. The trial court denied the motion, ruling that the state could use the conviction if respondent testified. According to the stipulated facts, "[a]s a result of his conviction three weeks earlier for attempted robbery and the denial of the motion to preclude the introduction of such evidence, Thompson did not take the stand and deny his guilt in the murder case." Stip. ¶ Q. The prosecutors thus achieved their first strategic goal of precluding Thompson from testifying.

During the sentencing phase at the murder trial, Marie LaGarde testified that she and her brothers were nearly killed by Thompson in the robbery. Dubelier argued to the jury that because respondent had already been sentenced to 49½ years without parole in the robbery case, the only way to punish him for the murder was to impose the death penalty. The jury sentenced Thompson to death, thus achieving the prosecutor's second objective for reversing the order of the trials.

Thompson spent most of the next 14 years on death row at the Louisiana State Penitentiary in

Angola, Louisiana, exhausting his post-conviction and habeas appeals. During those fourteen years, Thompson lived in solitary confinement in a six-by-nine foot cell. A final death warrant was issued in April 1999 after years of post-conviction proceedings.

Shortly before Thompson was to be executed, an investigator for Thompson's attorneys unearthed a copy of the 1985 crime lab report showing that the perpetrator of the armed robbery had type "B" blood. As previously noted, Thompson's blood is type "O," making it impossible for him to have been the robber. Given the obvious link between the murder and the robbery case, the execution was stayed. The district attorney moved to vacate the armed robbery conviction and did not retry Thompson for that crime.

After Thompson's investigator discovered the blood evidence in 1999, a former prosecutor, Michael Riehlmann, reported that in 1994, Deegan (who had been the junior prosecutor in the armed robbery case) said to Riehlmann that the prosecution had failed to turn over evidence that in some way may have exculpated Thompson. On the witness stand in this civil action, Riehlmann was unclear about precisely what Deegan had said about the blood evidence and could not say whether Deegan had mentioned the involvement of other prosecutors. Deegan reportedly made the statement to Riehlmann after being told he had only months to live as a result of cancer. Riehlmann did not tell anyone about Deegan's revelation until five years later, after the blood

evidence had been discovered by Thompson's investigator.

At the suggestion of prosecutor John Jerry Glas, the district attorney convened a grand jury in June 1999 to investigate "the conduct of his own office and the former [prosecutors] who were involved in the prosecution of Mr. Thompson in the armed robbery case." Stip. ¶ Z. Even though the same prosecutors were involved in both the armed robbery and murder cases—and it was stipulated that the armed robbery case was part of the strategy for the murder prosecution—the district attorney concluded that it was unnecessary to investigate possible *Brady* issues in the murder case. Before the grand jury had heard from all witnesses, Orleans Parish District Attorney Harry Connick ended the investigation and dismissed the grand jury, over Assistant District Attorney Glas's vehement objection. Glas resigned in protest over Connick's dismissal of the grand jury.

After extensive further factual investigation by Thompson's attorneys—including a review of the district attorney's files in the murder case—the state trial court held a hearing on Thompson's application for relief concerning the murder conviction. During the hearing, Thompson presented the court with extensive evidence that had not been revealed during the 1985 murder trial. Thompson further urged that the non-production of the blood evidence and use of the invalid armed robbery conviction had unconstitutionally deprived him of his right to testify in the murder case. The state trial court vacated

Thompson's death sentence but left the murder conviction intact.

The state appellate court reversed the murder conviction, ruling that Thompson "was denied his right to testify in his own behalf based upon the improper actions of the State in the [armed robbery] case." *State* v. *Thompson*, 825 So. 2d 552, 557 (La. App. 4th Cir.), *writ denied*, 829 So. 2d 427 (La. 2002). According to the state appellate court, the non-production of the blood evidence "led to Thompson's improper conviction in that case and his subsequent decision not to testify in the [murder] case." *Ibid.* Although Thompson had presented significant evidence demonstrating that the prosecutors had failed to produce other favorable evidence in the murder case, the state appellate court found it unnecessary to address whether the non-production of that other evidence provided additional grounds to vacate the murder conviction.

In May 2003, the district attorney's office retried Thompson for the Liuzza murder. Free of the robbery conviction, Thompson took the stand in his own defense. The jury heard and saw over a dozen pieces of evidence that prosecutors had not turned over during the first murder trial. That evidence included several police reports containing eyewitness descriptions of the murderer that did not match Thompson's description—reports that were not turned over despite Thompson's requests for all police reports containing descriptions inconsistent with Thompson's appearance.

The trial evidence also included photographs, statements attributed to Thompson's co-defendant, and information regarding the monetary reward given to a key witness for the state. (At the original trial, prosecutors had suggested that the witness was not going to receive reward money.) The jury heard the testimony of three critical eyewitnesses from the scene of the murder who were interviewed by police and listed in the undisclosed police reports, but who had not been disclosed to respondent at or before the 1985 trial.

The jury returned a verdict of not guilty in 35 minutes. Thompson was released from prison more than 18 years after his arrest.

II. PROCEEDINGS BELOW

A. Proceedings In The District Court

Less than one year after the state appellate court vacated the murder conviction, Thompson filed this civil rights action for damages arising from that conviction. The complaint alleged that under 42 U.S.C. § 1983, the district attorney had been deliberately indifferent to the need to train, monitor, and supervise prosecutors in his office as to their obligations under *Brady* and that this caused Thompson's conviction and wrongful imprisonment.

The week-long civil trial concerned municipal liability claims based on the policies of the district attorney as official policymaker, not personal liability

claims directed against individual prosecutors. The jury heard evidence demonstrating that the district attorney failed to train, supervise, and monitor the prosecutors in his office regarding *Brady*. Indeed, viewed in the light most favorable to Thompson, the jury heard that the district attorney's office had absolutely no *Brady* training at the time of Thompson's prosecutions. The district attorney stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." Stip. ¶ UU (italics added). Dubelier, Williams, Whittaker, and Riehlmann all admitted they could not recall a single training session while in the district attorney's office, nor could they recall any training regarding *Brady*.

Although the district attorney and two of his former first assistants claimed there were regular training programs, not a single prosecutor from the hundreds who worked under them over the years testified about any training or instruction on *Brady* obligations during the relevant time period.

The jury also heard evidence of confusion among the prosecutors in the office concerning their *Brady* obligations. Although the district attorney stipulated that the crime lab report constituted *Brady* material and argued that any reasonable prosecutor would have recognized blood evidence as such, several of the district attorney's own witnesses—including the office's Rule 30(b)(6) designee—testified that the blood evidence was not *Brady* material in the absence

of knowledge of respondent's blood type. The jury also heard testimony that the district attorney and his first assistant had expressed that view at the time of the grand jury proceedings.

During the 2007 civil trial, both Dubelier and Williams displayed their fundamental misunderstanding of *Brady*. For example, Dubelier claimed that *Brady* did not require the production of eyewitnesses' descriptions of the perpetrator that were inconsistent with the accused's appearance if he could posit a theory why the accused may have changed his appearance at the time of the crime. Williams testified that he believed *Brady* did not require the production of impeachment material. Williams's misunderstanding of *Brady* was so fundamental that the district judge visibly registered surprise at Williams's testimony, prompting Williams to change his testimony before the jury.

Not only was *Brady* training in the district attorney's office non-existent, there was also no supervision or monitoring of "special" prosecutors, such as Dubelier and Williams, who were entirely exempt from supervision, even though they were only a few years out of law school.

The jury also heard undisputed evidence that there was no written policy manual in the district attorney's office when Thompson was prosecuted. According to the stipulated facts, the office did not have a policy manual until 1987, two years after Thompson's trial. The 1987 policy manual, which was

described by the district attorney's office as a supposed compilation of prior policies, included just four sentences devoted to *Brady*, and badly misstated the law in at least three important respects. Thompson's expert witness testified that the 1987 policy contained multiple errors of law; failed to communicate the importance of *Brady* compliance; and failed to give proper guidance to prosecutors in the office. He testified that not only did the policy incorrectly limit *Brady* to instances where a defense request had been made and the court ordered evidence to be produced, but it also incorrectly suggested that the legal requirement was limited to "exculpatory" evidence. On the witness stand, the designated witness of the district attorney's office, Val Solino, conceded that the four sentences in the manual about *Brady* were deficient and, if applied to the armed robbery case against Thompson, would not have required production of the crime lab report that was not produced to the defense.

The jury also heard evidence of district attorney Connick's knowledge of the need to train and supervise his prosecutors regarding *Brady*. In this regard, Connick conceded that, as district attorney, he knew prosecutors confronted difficult situations requiring decisions about their *Brady* obligations, that he knew it was not always easy to determine whether evidence was required to be produced under *Brady*, that he knew *Brady* was an evolving legal obligation, and that he knew constitutional harm would result if his prosecutors did not understand their *Brady*

obligations. Other former prosecutors from the office similarly noted the "gray" areas under *Brady* and the need for training to delineate the contours of the rule. Former first assistant, Timothy McElroy, for example, testified that *Brady* compliance is dependent upon the adequacy of the training provided, because it is sometimes difficult for a prosecutor to determine whether evidence is exculpatory.

The district attorney knew the danger of *Brady* violations was real, and that if prosecutors made wrong decisions under *Brady*, constitutional harm would result. He admitted that before the 1985 prosecutions against respondent, there were at least four cases leading to published opinions of the Louisiana Supreme Court finding *Brady* violations by prosecutors in his office. The district attorney also admitted that most *Brady* issues never lead to published opinions, and that *Brady* violations had occurred in other cases not described in published opinions. Nevertheless, no witness was able to identify a single, specific corrective measure taken in response to any *Brady* violation by prosecutors in the office.

The district attorney compounded the complete absence of *Brady* training by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements; the prosecutors involved in respondent's trials stated they were following that policy when they did not produce the police reports to the defense in the murder case. And Connick admitted his policy of presumptive

non-disclosure made it particularly crucial for his prosecutors to understand *Brady* and make proper *Brady* determinations. Thus, despite Connick's actual awareness of the crucial need for training and supervision, the jury properly could have concluded that there was no *Brady* training at the time of Thompson's prosecutions.

The jury also heard evidence from which it could conclude that the non-production of the blood evidence was not the isolated act of a rogue prosecutor but rather that multiple prosecutors had been involved in the non-production of the blood evidence at Thompson's original trial. Whittaker testified he saw the crime lab report and placed it conspicuously on Williams's desk. Williams denied seeing the report, but admitted he knew of the blood evidence and that he deliberately avoided mentioning the blood evidence in his questioning of witnesses and argument at the armed robbery trial. Dubelier, too, was aware of blood evidence. None of those witnesses offered any credible explanation for why they did not produce the blood evidence to respondent. Moreover, the district attorney stipulated that numerous other pieces of evidence, including police reports and witness statements, were not turned over to Thompson during his murder trial.

At the close of the evidence in the civil trial, the district judge carefully instructed the jury regarding the elements of Thompson's cause of action and submitted a special verdict form. There were no

objections from the defendants on the critical points. The jury returned a $14 million verdict in respondent's favor. The district court entered judgment, denied petitioners' post-trial motions, and awarded attorneys' fees and costs.

B. Proceedings In The Court Of Appeals

On appeal, a unanimous panel of the Fifth Circuit upheld the judgment in all material respects. The panel's 48-page opinion exhaustively reviewed the evidence, determining among other things that the jury properly could have found: (1) that "Connick was aware that the attorneys in the DA's Office would be required to confront *Brady* issues on a regular basis and that failure to properly handle those issues would result in constitutional violations * * * *"; (2) that "the need to train about *Brady* was obvious * * * *"; (3) that there was "ample evidence that the attorneys [in the DA's Office] received no training on *Brady's* requirements * * * *"; and (4) that there was "evidence from which the jury could have believed that others [besides Deegan] had a hand in failing to turn over the exculpatory evidence * * * * *" See Pet. App. 20, 26 & 30. Applying this Court's precedents, the panel announced no new rule of law and found no basis to overturn the jury verdict or judgment.

Petitioners sought rehearing *en banc*, which was granted. The grant of rehearing vacated the unanimous panel opinion. Pet. App. 1a. By an equally divided 8-8 vote, the *en banc* court, without opinion,

affirmed the district court judgment entering the jury verdict in Thompson's favor. *Ibid.*

Chief Judge Jones (and joined by no other member of the court) wrote separately to express her view that imposing *Monell* liability under § 1983 on municipalities for program- or policy-based constitutional violations—even under the exacting standards set by this Court—is at odds with the absolute immunity afforded individual prosecutors from personal liability under *Imbler*. Pet. App. 2a-7a.

Judge Jolly specially concurred to observe that "[o]rdinarily, when an en banc case results in a tie vote, we affirm the district court without opinion," and to express his view that "[t]hat is the way I would prefer it today," given that "there is no majority opinion, and that no opinion today will bind any court or future party in this circuit * * * * " *Id.* at 8a.

Judge Clement, joined by five other judges, wrote separately to explain that she would overturn the jury verdict because the evidence in the instant case, in her view, was insufficient to establish municipal liability. Pet. App. 9a-43a.

Judge Prado, author of the now-vacated unanimous panel opinion, wrote separately on behalf of himself and four other judges to explain that Judge Clement's opinion "overlooks much of the evidence the jury heard and ignores the standard of review that we apply to jury verdicts." *Id.* at 45a-50a. Objecting to that attempt to "retry this case through the appellate process," Judge Prado observed that

"the fact that reasonable judges on this court view the evidence differently suggests that these factual disputes were for the jury to resolve." *Id.* at 49a. Allowing the judgment in this "extraordinary case" to stand will not, in Judge Prado's view, "subject municipalities to widespread liability, as a holding that the need for training was 'so obvious' and the lack of training 'so likely' to create a constitutional violation will apply only in the rare instance." *Id.* at 50a. "This is that rare case." *Ibid.* (Prado, J.).

The *per curiam* order of the *en banc* court is not precedential. Pet. App. 1a; see also *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 667 n.5 (5th Cir. 2003). Petitioners did not request that the Fifth Circuit certify any question of law to this Court for review, nor did the Fifth Circuit do so on its own initiative—as it has recently done after dividing evenly in another *en banc* case. *United States* v. *Seale*, 577 F.3d 566 (5th Cir. 2009) (certifying question of law to this Court after the *en banc* court evenly divided), *question dismissed*, 130 S. Ct. 12 (2009).

REASONS FOR DENYING THE PETITION

Most fundamentally, the petition should be denied because there is no precedential decision for this Court to review. With the unanimous panel decision in Thompson's favor now vacated, and the *en banc* court of appeals having evenly divided, all that remains is the court of appeals' non-precedential *per*

curiam order affirming the district court's entry of a jury verdict in Thompson's favor. Moreover, the principal ground dividing most members of the *en banc* court involved different interpretations of the evidence adduced at trial. It is thus difficult to imagine a more fact-bound decision or limited outcome. Petitioners merely seek splitless, fact-bound review of a jury verdict. The petition should be denied.

I. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE ON WHICH THERE IS A DIVISION OF AUTHORITY

A. At Most, The Petition Seeks Review Of The Fact-Bound Application Of Settled Legal Principles

Over 20 years ago, this Court recognized that under *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978), municipal liability may be imposed in certain, narrow circumstances for an official policymaker's failure to train, monitor, or supervise employees. *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). A successful claimant must prove three elements: (1) a failure to train, monitor or supervise; (2) a causal connection between that failure and the constitutional violation suffered by the claimant; and (3) deliberate indifference to the claimant's constitutional rights. *Cousin* v. *Small*, 325 F.3d 627, 637 (5th Cir. 2003).

After being properly instructed on the law, the jury in this case reasonably found each element satisfied. The petition makes numerous arguments

why that verdict should be overturned. But those fact-bound arguments disregard the evidence actually before the jury and misapprehend settled, controlling law.

This Court has made clear that in a failure-to-train case, a plaintiff need not prove a pattern of similar violations where, as here, the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train. *Bd. of County Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 407-09 (1997); *Canton*, 489 U.S. at 390, n.10.

Utilizing the proper standard of review, the evidence in this case met those standards. The district attorney has admitted in this case that he was fully aware that: (1) his prosecutors frequently confronted decisions involving *Brady*; (2) it was crucial for his prosecutors to make proper *Brady* decisions; (3) *Brady* decisions can involve difficult and evolving legal principles; and (4) if prosecutors made wrong *Brady* decisions, constitutional harm would result. Viewed in the light most favorable to the jury's verdict, there was ample evidence that, despite the district attorney's actual awareness of the need for training, he nevertheless failed to provide any training or any clear message regarding *Brady*. Several prosecutors involved in the Thompson prosecution testified that they received no *Brady* training or instruction from anyone in the office, and the parties stipulated that "none of the district attorney witnesses recalled any specific training

session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." Stip. ¶ UU (italics added).

Deliberate indifference was evidenced not only by the district attorney's awareness and failure to provide any training, but also by the content of the *Brady* section of the policy manual created a mere two years after Thompson's prosecution. That section, consisting of a total of four sentences, reflected deliberate indifference by grossly understating and misstating the requirements of *Brady*, and by entirely failing to mention the rights of the accused (focusing instead on the expense and inconvenience to the office of mistrials and appeals resulting from *Brady* issues). The jury could properly find further evidence of deliberate indifference to *Brady*'s requirements from the treatment of *Brady* contained in the manual.

In addition, the jury was free to reject the district attorney's theory that a single "rogue prosecutor" (Deegan) acted alone in causing Thompson's injuries. The district judge correctly charged the jury, stating, among other things, that "the fault must be in the training program itself, not in a particular prosecutor." Pet. App. 93a-94a. At least three other prosecutors besides Deegan knew about the blood evidence, yet failed to produce it. Indeed, Deegan was the most junior member of the team, and the jury properly could have concluded that the most junior member would not have acted unilaterally to withhold evidence known to exist by more senior prosecutors in this high-profile case.

Moreover, in finding a causal connection between the district attorney's failure to train and Thompson's injuries, the jury properly considered the other *Brady* violations committed by Williams and Dubelier in the murder case, as well as the testimony demonstrating their failure to understand *Brady*'s requirements. The numerous *Brady* violations by multiple prosecutors in this case and their confusion about *Brady* further reflected the failure of the office to provide *Brady* training.

Contrary to petitioners' claim (supported only by a citation of Judge Clement's opinion, which provides no citation of the record) that the "'uncontroverted and unimpeached testimony' * * * proved that office policy was to turn over the kind of report at issue" (Pet. 11 (citing Pet. App. 31a) (Clement, J.)), the evidence actually demonstrated the contrary. In this regard, for example, both the district attorney's Rule 30(b)(6) designee and statements attributed to the district attorney himself disputed the constitutional obligation to produce the blood report if the prosecutors did not know Thompson's blood type. See Trial Transcript ("TT") 410, 986. Viewed properly, the evidence was sufficient to show both that the district attorney was deliberately indifferent to the need to train the prosecutors in his office as to their *Brady* obligations, and that his failure to train caused the violation of Thompson's constitutional rights.

The petition nowhere identifies a single statement of legal principle from any of the non-precedential decisions of the courts below with which it disagrees. Instead, the petition takes issue with the

application of those principles to the evidence presented to the jury in this case. But the application of properly stated and settled legal principles to the peculiar facts of an individual case is not the sort of issue that warrants this Court's review. See Sup. Ct. R. 10. Indeed, petitioners' own *amici*, Orleans Parish Assistant District Attorneys, concede that the "analytical framework for analyzing municipal failure to train claims based on a single constitutional violation" is "well-established." Br. of *Amici* 6. Here, moreover, review would be particularly inappropriate given that petitioners' arguments invoke *factual* disputes. See, e.g., Pet. 26-30 (arguing that Thompson "failed to show culpability and causation").

B. There Is No Division In Authority

Perhaps recognizing that the application of settled law to the "extraordinary facts" of this "extraordinary case" (Pet. App. 50a) (Prado, J.) is insufficient to warrant review by this Court, petitioners claim that "[i]n two decades," the courts of appeals "have not developed a consistent approach to applying single-incident liability to *Brady* violations." Pet. 17-26. Petitioners do not identify any actual or clear split of authority, nor could they, as the purported lack of "consistency" petitioners identify merely reflects at most the fact-bound application of settled legal rules in different settings. And "the absence of any conflict" among the lower courts "is plainly a sufficient reason for denying certiorari." *Singleton* v. *Comm'r of*

Internal Revenue, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari).[1]

1. The Supposed "Divergent Approaches" Claimed By Petitioners Are Illusory

Petitioners claim that in the "two decades" since this Court acknowledged in *Canton* the prospect of so-called "single-incident" municipal liability for failure to train, "four circuits" (the Second, Fifth, Sixth, and Eighth) have confronted the issue and, although all four have applied *Canton*, they "do not agree on the proper analysis" and have "reach[ed] inconsistent results." Pet. 17. At most, however, the petition simply cites different outcomes in a handful of cases. And those different outcomes, far from reflecting a genuine conflict among the circuits, merely reflect inevitable differences in applying the same legal principles to a variety of different facts and circumstances.

Petitioners begin with the Second Circuit's decision in *Walker* v. *City of New York*, 974 F.2d 293 (2d Cir. 1992), but concede that *Walker* "limited itself to the time period and evidence at issue" in that particular case. Pet. 18. What is more, petitioners concede that the Second Circuit has stressed that in

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[1] Even if there were any conflict, which there is not, petitioners themselves repeatedly refer to it as "stagnant" (Pet. 22, 25), i.e., stale—providing yet another reason this Court's review is unwarranted.

failure-to-train cases like this one, courts must adhere to the "heightened culpability and causation standards emphasized by this Court in *Bryan County*." *Id.* at 19 (citing *Amnesty Am.* v. *Town of W. Hartford*, 361 F.3d 113 (2d Cir. 2004), and *Aretakis* v. *Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *1 (N.D.N.Y. Feb. 3, 2009)).

Petitioners similarly concede that in the Eighth Circuit case they cite, the court likewise "applied the stringent culpability and causation requirements from [this Court's decisions in] *Canton* and *Bryan County*." Pet. 19 (citing *Reasonover* v. *St. Louis County*, 447 F.3d 569, 583-84 (8th Cir. 2006)). There is thus no "inconsistency" between *Walker* and *Reasonover*. Rather, as petitioners themselves acknowledge, the "evidence" in *Reasonover*, unlike the evidence here or in *Walker*, simply failed to show that the "*particular* violations 'were the result of inadequate training or supervision.'" *Ibid.* (emphasis added) (quoting *Reasonover*, 447 F.3d at 584).

Citing two cases from the Sixth Circuit, petitioners insist that court has adopted a more "lenient" approach to municipal liability than the Eighth Circuit. Pet. 21. But even that claim of a shallow (and unacknowledged) conflict is unfounded. For instance, in *Gregory* v. *City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006), the police officers (like the prosecutors here) had received no *Brady* training, and even the chief of police in that case "believed that officers were confused" about *Brady*. Petitioners quibble that in *Moldowan* v. *City of Warren*, 578 F.3d 351 (6th Cir.

2009), the Sixth Circuit "said nothing about heightened causation," Pet. 21, but that is hardly surprising given that the issue in that interlocutory appeal was whether the plaintiff had presented sufficient evidence of an underlying violation of a constitutional right in the first instance. *Moldowan*, 578 F.3d at 393 ("the City * * * argues that Moldowan cannot establish municipal liability * * * because he cannot establish an underlying deprivation of a constitutional right"). Indeed, whether the plaintiff in *Moldowan* had "alleged facts sufficient to satisfy the elements of a claim for municipal liability" was "beyond the scope" of the limited interlocutory appeal in that case. *Id.* at 394 n.19.

Petitioners are left to argue that neither the Sixth nor the Eighth Circuit has "adopted" the Second Circuit's "*Walker* analysis." Pet. 21. But that is of no moment. Plaintiffs do not claim that under *Walker*'s analysis, any of those cases would have come out differently. Engaging in self-contradiction, petitioners first assert that the Fifth Circuit's approach "resembles the Second Circuit's, at least superficially" (and point out that the jury in this case was instructed "under the three-part *Walker* test"), *id.* at 22, but then speculate that the evidence in this case "would *likely* fail in the Second Circuit" and "*might* satisfy Sixth Circuit but fail Eighth Circuit standards." *Id.* at 23 (emphasis added). But far from showing that the Sixth Circuit applies a "lenient" standard while the Second and Eighth Circuits apply a more "stringent" one, petitioners' reliance on

Reasonover—like the other cases they cite—reflects the unsurprising fact that applying the same legal rule to different facts can yield different results commensurate with factual differences.

2. The Remaining Cases Upon Which Petitioners Rely Are Inapposite

Petitioners do no better in their effort to establish that the jury's verdict in Thompson's favor "deepens persisting uncertainty, both inside and outside the Fifth Circuit," concerning municipal liability based on so-called "single incident" liability for failure to train on *Brady*. See Pet. 25. Most fundamentally, petitioners simply ignore that the *per curiam* order of the evenly divided *en banc* court (not to mention the now-vacated panel opinion) affirming the jury verdict carries no precedential weight whatsoever—and thus is limited solely to the facts of this "extraordinary" and "rare" case. And even if one were to assume that an intra-Fifth Circuit conflict exists, it is well settled that such a conflict furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, petitioners miss the point. The fact that the Fifth Circuit has affirmed the imposition of municipal liability for failure to train based on a "single incident" only twice (including in the case at bar) since *Canton* was decided over 20 years ago—while rejecting liability in numerous other cases

presenting different facts—merely confirms what this Court has already made plain: The heightened standard for liability under such circumstances is difficult to satisfy and, as the Fifth Circuit has itself made clear, a plaintiff "*usually*"—but not necessarily—"must demonstrate a pattern" of constitutional violations to establish the deliberate indifference necessary to impose municipal liability. *Cousin*, 325 F.3d at 637.

Petitioners seize on *Cousin* to argue that the Fifth Circuit has "considered—and approved—the same office's record of *Brady* enforcement during the time period covering Thompson's case." Pet. 25. Not so. For one thing, petitioners' reference to the "time period covering Thompson's case"—which petitioners identify on the previous page as Thompson's § 1983 case (Pet. 24) (filed in 2003), *not* his much earlier burglary or murder trials (conducted in 1985)—is irrelevant at best and misleading at worst. For another, petitioners neglect to mention that the plaintiff in *Cousin* "*concede[d]*" that the "policy and training program" at issue at the time of Cousin's prosecution was "adequate." 325 F.3d at 638 (emphasis added). Far from involving a concededly adequate training program, the record in this case revealed that the district attorney's office provided absolutely no training at the time of Thompson's prosecutions. Petitioners' selective reading of these cases—and failure to acknowledge the very different facts that undergird their different results—cannot create a conflict where none exists. There being no conflict, the petition should be denied.

II. PETITIONERS OFFER NO OTHER SOUND BASIS FOR FURTHER REVIEW

Unable to muster a true conflict, petitioners claim that the district court's decision entering the jury verdict is in tension with this Court's cases, and predict dire consequences if review is denied. Neither the claimed tension nor petitioners' Cassandra-like prophecies are well-founded, and neither justifies review in this Court.

A. The Jury's Verdict In Thompson's Favor Does Not Conflict With This Court's Decision In *Goldstein*

Contrary to petitioners' assertions (Pet. 33), this Court's decision last Term in *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009), does not require a different conclusion. The only claims before the Court in *Goldstein* involved the personal liability of individual prosecutors. *Goldstein*, 129 S. Ct. at 858-59. The Court was not presented with municipal liability claims under *Monell*, as in this case. *Goldstein* thus addressed the entirely different issue of the immunity of *individuals*, not of *municipalities*.[2] This Court has long held that municipalities cannot claim the same

[2] The same distinction renders inapposite *Pottawattamie County* v. *McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (Apr. 20, 2009), *writ dismissed*, No. 08-1065, 2010 WL 6917, at *1 (Jan. 4, 2010), which involved personal liability of individual prosecutors for misconduct—not, as here, municipal liability for a wholesale failure to train.

immunities that shield individuals from damages liability under § 1983—and *Goldstein* did not alter that longstanding rule. Petitioners' implicit argument that *Goldstein* should be extended to such claims would effectively overrule *Monell* (not to mention *Bryan County*), and must be rejected for that reason alone.

What is more, the argument is meritless. The rationale for individual prosecutorial immunity simply does not apply to municipal liability. The "basic fear" underlying individual prosecutorial immunity is "that the threat of damages liability would affect the way in which individual prosecutors carried out their basic court-related tasks." *Goldstein*, 129 S. Ct. at 862. But that rationale loses its force when it is the municipality, in contrast to the individual, whose liability is at issue. This Court has explained in the analogous context of qualified immunity:

> [C]onsideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Owen v. *City of Independence*, 445 U.S. 622, 656 (1980). Thus, although this Court has indicated that individual prosecuting attorneys should not be

focused on personal liability, it is important for the official policymaker to consider just such matters.

In *Canton*, this Court recognized that in some municipal-liability cases, the need for training government employees so as to avoid the deprivation of citizens' constitutional rights is objectively obvious. 489 U.S. at 390. The threat of liability to the municipality for deliberate indifference to that need encourages public officials to proactively provide training on important constitutional principles, while at the same time ensuring that municipalities are not subjected to liability for isolated mistakes or held vicariously liable for their employees' torts. The potential for deliberate-indifference liability thus provides an incentive for training on difficult constitutional questions—and encouraging a proactive approach has the potential to ultimately decrease both the instance of constitutional violations and the number of § 1983 lawsuits.

Under petitioners' preferred approach, however, a municipality could be held liable under *Monell* only if its explicit policies cause constitutional injury. Such an approach is both at odds with this Court's precedent, and would also create perverse incentives by encouraging local officials to avoid altogether the creation of clear policies on difficult constitutional questions. What is more, if liability for deliberate indifference were limited—contrary to this Court's precedent—solely to circumstances in which the policymaker had actual knowledge of the need to train a particular employee, such a rule would

encourage policymakers to avoid knowledge of their employees' bad acts and to conduct training on an *ad hoc* basis rather than by developing sound constitutional policies. Such a regime would be directly contrary to the important interests this Court has carefully balanced in establishing the "deliberate indifference" standard for failure-to-train claims in the first place.

Similarly, if deliberate indifference liability is limited to cases in which a pattern of violations can be shown, as petitioners apparently would have it, the incentive for local officials to do the difficult work of constitutional policymaking would be severely diminished. This Court has left no doubt that, due to the difficult choices public employees must make and the frequency with which their incorrect choices can cause constitutional violations, training is obviously necessary in some situations. *Canton*, 489 U.S. at 390. Enforcement of that rule protects even the first victim of a non-trained employee by encouraging at least some training from the outset rather than waiting for a pattern of violations to emerge. That, in turn, would reduce the potential exposure of municipalities to § 1983 liability.[3]

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[3] See Transcript of Oral Argument at 54, *Herring* v. *United States*, 129 S. Ct. 695 (2009) (Deputy Solicitor General of the United States "suggesting that civil remedies will provide incentives to the police to avoid the bog of litigation by putting into place systems that will prevent this kind of error"); see also

(Continued on following page)

Moreover, this case involves a wholesale failure of the policymaker to provide *any* relevant training, not merely a deficient training program. Courts, including the Fifth Circuit, have consistently required proof of a pattern of violations where the policymaker has provided some relevant training, and where the training is allegedly inadequate. Compare *Snyder* v. *Trepagner*, 142 F.3d 791, 198-99 (5th Cir. 1998); *Thompkins* v. *Belt*, 828 F.2d 298, 304-05 (5th Cir. 1987) (requiring proof of a pattern because the attack was on the adequacy of existing training) to *Bd. of County Comm'rs of Bryan County*, 520 U.S. at 407-09 (distinguishing no-training cases from deficient training cases).

In our system of justice, the deference given to prosecutors is virtually unlimited—and properly so. Absolute immunity shields prosecutors in carrying out their duties so that fear of personal liability will not inhibit the performance of their critical role in maintaining law and order. Thus, when the constitutional rights of individuals are violated by prosecutorial misconduct, redress is generally available only through a suit against a government policymaker, such as a district attorney, in his official capacity. Even then, only the most extreme cases can satisfy the stringent requirements for liability. Nothing less than proof of the policymaker's deliberate

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Brief of Respondent United States at 29-31, *Herring*, 129 S. Ct. 695 (2009).

indifference to constitutional rights will suffice. Such cases will be rare. But this is such a case.

When deliberate indifference by the government comes to light, as it did in this case, public confidence in the integrity of the justice system is shaken. Congress has determined that, under appropriate circumstances, civil damage actions seeking redress for constitutional injuries caused by government misconduct have an important role to play in reinforcing the bedrock principle that we are a nation of laws, not men. Under the exceptional and unusual facts of this case, the jury's verdict vindicates that bedrock principle, reinforces the rule of law, and restores public confidence in the criminal justice system. Contrary to petitioners' arguments, it is faithful to this Court's precedent, consistent with its § 1983 jurisprudence, and respectful of the rule of law.

B. The Fact-Bound Decision To Affirm The Jury's Verdict Lacks Forward-Looking Significance

Petitioners assert hyperbolically that the jury's verdict in Thompson's favor will result in widespread municipal liability. Pet. 17. That speculation is unfounded. This Court decided *Canton* over 20 years ago, and during that time it has not resulted in widespread liability to municipalities because the standard itself is so exacting. Petitioners concede as much, asserting that the "[f]ederal circuit courts have recognized that single-incident liability is *exceptional*,"

that "failure-to-train *usually* demands a pattern of violations," and that the lower courts "confine single-incident liability *largely* to situations like *Canton*'s deadly force hypothetical." Pet. 17 (emphasis added). Indeed, petitioners concede that in the last 20 years, the Fifth Circuit has permitted single-incident liability only twice—including in this case. *Ibid.* (citing *Brown* v. *Bryan County*, 219 F.3d 450 (5th Cir. 2000)). Petitioners simply disagree with the fact-bound application of those settled legal principles to the extraordinary—indeed, potentially unique—facts of this case. See Pet. App. 50a (Prado, J.) (observing that "this is an extraordinary case, with extraordinary facts").

Although petitioners try to make much of Judge Clement's observation (Pet. App. 44a) that Thompson failed to satisfy the rigorous standards for causation and deliberate indifference in failure-to-train cases like this one, that analysis overlooks the actual evidence adduced at trial. See, e.g., Pet. App. 45a (Prado, J.). The fact remains that whether liability for deliberately indifferent failure to train is properly imposed under § 1983 is an issue to be determined on a case-by-case basis, based on what are unquestionably exacting standards. Absent a showing that the jury verdict here will impact a significant number of cases—a showing petitioners cannot make—petitioners' arguments reduce to a claim that the jury's allegedly erroneous weighing of the evidence (see, e.g., Pet. 26-30) is itself important. If the issue is truly important, it will recur in other courts and

crystallize into a clear legal question over time. But the jury's verdict in this "extraordinary" and fact-bound case—particularly in the absence of any precedential circuit court decision—certainly does not warrant review now.

For the same reason, the petition fails to show that the issue in this case has forward-looking significance. The district attorney's *amici*, Orleans Parish Assistant District Attorneys, express concern about the potential impact of the monetary judgment on the district attorney's office. That argument ignores not only the devastating impact of the injury to Thompson—who spent eighteen years in prison, fourteen of them in solitary confinement on death row, for crimes he did not commit—but also the district attorney's deliberately indifferent failure to fulfill his constitutional obligations. Moreover, Louisiana law requires district attorneys to maintain liability insurance (La. 42:1441.2(B)) for the purposes of satisfying such judgments. The district attorney here simply chose to ignore the statute. For that reason, too, the issue is fact-bound and unlikely to recur. For those reasons alone, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

Supreme Court, U.S.
JAN 25 2010
OFFICE OF THE CLERK

No. 09-571

In the Supreme Court of the United States

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Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

The Court should grant certiorari in this case to police the outer boundaries of municipal liability and to resolve confusion caused by its own jurisprudence. Based on a single *Brady* violation, the *en banc* Fifth Circuit has affirmed a crippling failure-to-train award against the Orleans Parish District Attorney's Office. Only the strained extension of this Court's *Canton* decision allowed Thompson's case to avoid dismissal. *See City of Canton v. Harris*, 489 U.S. 378 (1989). Three circuits now follow that misguided approach. Pet. 17-26. Six dissenting judges thus accurately warned that the result in this case threatens to "encourage the extension of single incident liability," Pet. App. 9a, and erode the foundations of municipal liability law for district attorneys' offices across the nation.

ARGUMENT

THIS CASE CLEANLY POSES AN UNSETTLED QUESTION OF MUNICIPAL LIABILITY FOR PROSECUTORS NATIONWIDE.

Respondent John Thompson says these questions are "fact-bound, splitless, [and] unlikely to recur." Opp. 1. He is wrong. The only pertinent fact is undisputed: that Thompson was harmed by a single *Brady* violation.[1] The issue posed is

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[1] Thompson now attempts to obscure this by rearguing the evidence. *See* Opp. 9-13, 18-21. But his skewed depiction of the office's *Brady* record is beside the point: both the district court and the court of appeals treated the case as presenting a single *Brady* violation unconnected to any pattern of similar

whether that one violation can trigger failure-to-train liability for an entire prosecutorial office, absent a pattern of similar violations. The answer—on which four circuits have been unable to agree, Pet. 17-26—lies hidden in an elusive footnote in this Court's two-decades-old *Canton* opinion. *See Canton*, 489 U.S., at 390 n.10. Only this Court can provide that answer and clarify whether district attorneys' offices nationwide may be exposed to civil liability for countless decisions their prosecutors make every day.[2]

Thompson's "most fundamental" objection to review, however, has nothing to do with the merits. Opp. 16, 25. He deems the case unsuitable for certiorari because the evenly divided *en banc* court of appeals affirmed without controlling opinion. But that did not stop this Court from reviewing federal education law in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 89 (2007); the constitutionality of a municipal picketing ordinance in *Frisby v. Schultz*, 487 U.S. 474, 478 (1988); remand standards for pendent

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violations. *See* Pet. 7 & n.7; Pet. App. 138a-142a (district court); Pet. App. 72a-80a (panel opinion).

[2] Thompson claims this case is "extraordinary" and "unique," in a transparent attempt to ward off review. *See* Opp. 16, 25, 32-34. Thompson's ordeal was certainly extraordinary, but the issue posed by this case is not. As Judge Clement explained, the Fifth Circuit's extension of *Canton* will expose district attorneys' offices to unprecedented liability based on prosecutors' decisions concerning "*Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, [and] many more." Pet. App. 27a.

state claims in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348 (1988); the constitutional assistance required for guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 55-56 (1985); or the standards for proving racial discrimination under § 1981 in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 382 (1982). Evenly split courts did not thwart review because—one would assume—disagreement among numerous circuit judges typically flags a certworthy issue. It does here.[3]

Far from "involv[ing] different interpretations of the evidence," Opp. 17, the competing opinions in this case (joined by eleven of sixteen judges) took irreconcilable views of this Court's jurisprudence. Judge Clement's six-judge dissent makes this clear. She thought municipal liability case law "clearly and emphatically" counseled dismissal "as a matter of law," because Thompson's single *Brady* violation failed the standards of *Monell*, *Canton*, and *Bryan County*. Pet. App. 43a-44a. Her dissent thus warned, in its first sentence, that the result "should not encourage the extension of single-incident liability under *Monell*." Pet. App. 9a; *see Monell v. Dep't of Social Serv's*, 436 U.S. 658 (1978). At stake

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[3] For the same reason, Thompson's argument that the *en banc* disposition is not "precedential" is beside the point. Opp. 16, 25. Ironically, however, one of the *en banc* opinions has already been cited in a subsequent failure-to-train case in the Fifth Circuit. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 860 n.4 (CA5 2009) (Montalvo, J., dissenting) (citing *Thompson v. Connick*, 578 F.3d 293, 314 (CA5 2009) (en banc) (Prado, J., joining)).

are not competing facts, then, but divergent interpretations of municipal liability jurisprudence.

This shatters Thompson's major premise: *i.e.*, that Petitioners complain only about the "application of settled law." Opp. 16-18, 20-21. The law at issue, however, is neither *Monell* nor *Canton* generally, but a far more specific and unsettled aspect of those cases. As Thompson admits, the legal principle on which his case hinges is that, in *certain* failure-to-train cases,

> a plaintiff need not prove a pattern of similar violations where ... the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train.

Opp. 18 (citing *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 407-09 (1997); *Canton*, 489 U.S., at 390 n.10). If prosecutors' *Brady* obligations do not fall within that rule, Thompson's case would never have reached the jury.

That issue is not remotely "settled." *See* Pet. 13-26; Amicus Curiae Brief of National District Attorneys Association ("NDAA Amicus"), at 5-11. Failure-to-train claims ordinarily demand a pattern of employee wrongdoing. *See, e.g., Bryan County*, 520 U.S., at 405, 407-09; *Canton*, 489 U.S., at 391-92. Footnote dictum in *Canton* suggested that a single violation of certain, exceptional duties might substitute for a pattern. 489 U.S., at 390 n.10. But *Canton*'s sole example was police training on deadly force, which the Court has since called a

mere "hypothesis" meant for "a narrow range of circumstances." *Bryan County*, 520 U.S., at 409.

Training police to arrest criminals is a far cry from training lawyers to interpret the law. The Court has never suggested the two are analogous for failure-to-train claims, with good reason.[4] As Judge Clement observed, "[t]o hold a public employer liable for failing to train professionals in their profession is an awkward theory." Pet. App. 29a. That explains why the circuit courts[5] have stumbled in this area, as the Second Circuit's *Walker* decision best illustrates. *See* Pet. 18-19; NDAA Amicus 8-10 (discussing *Walker v. City of New York*, 974 F.2d 293 (CA2 1992)).

Walker's test for detecting single-incident situations goes well beyond the "narrow range" *Canton* envisioned. *See* 974 F.2d, at 297-98; Pet.

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[4] Indeed, in a similar context the Court has rejected the notion that legal malpractice can form the basis for a failure-to-train claim. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 701 (2004), rejected a court-made exception to federal tort immunity because the exception would have allowed barred claims—including legal malpractice—to be recast as "a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy."

[5] Because Thompson ignores the unsettled state of the underlying legal rule, he misses the circuit confusion it has caused. Opp. 22-25. The Fifth Circuit has uncritically adopted the *Walker* approach for *Brady* violations. The Sixth Circuit has not adopted *Walker* but does recognize failure-to-train liability for single *Brady* violations. By contrast, the Eighth Circuit has neither adopted *Walker* nor approved single-incident *Brady* training claims. Petitioner and its amici explain the divergent circuit approaches at greater length elsewhere. *See* Pet. 17-26; NDAA Amicus 8-10.

18 n.17. For instance, *Walker* requires that a situation merely "present[] the employee with a difficult choice of the sort that training or supervision will make less difficult." 974 F.2d, at 297-98. Under that broad inquiry, virtually any employee misstep would expose municipalities to single-incident liability. For a district attorney's office, it would embrace not only *Brady* obligations, but also prosecutors' decisions on "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." Pet. App. 27a. *Walker* thus converted an exceptional form of municipal liability into the norm, with particularly ruinous implications for prosecutorial offices.

Walker's flaws run yet deeper. The *Brady* violation there involved impeachment evidence and occurred shortly after *Brady* was decided. *Walker* suggested, however, that violations occurring later or involving exculpatory evidence would *not* qualify for single-incident liability. *See* Pet. 18-19; 974 F.2d, at 300. In addition to its inherent flaws, then, the *Walker* test does not even purport to reach all *Brady* violations.

Yet *Walker*'s confused extension of *Canton* has now bled into Thompson's case. Both the district court and the panel adopted *Walker* for the proposition that "Thompson did not need to prove a pattern of *Brady* violations." Pet. App. 80a (citing *Walker*, 974 F.2d, at 300); *see also* Pet. 22-23.[6]

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[6] Thompson misses *Walker*'s significance. The fact that the Second Circuit "limited" *Walker*'s test to certain *Brady* violations, *see* Opp. 22, underscores that the Fifth Circuit

This put Thompson's dramatic story before the jury, despite the fact that: (1) Thompson proved no pattern of similar violations; (2) Thompson's violation occurred fourteen years after *Walker*'s and involved exculpatory, not impeachment, evidence; and (3) the Fifth Circuit had recently found no pattern of *Brady* violations by the *same* district attorney's office during the period covering Thompson's robbery conviction. *See* Pet. 24-25 (discussing *Cousin v. Small*, 325 F.3d 627, 637-38 (CA5 2003)).[7]

This case thus presents a dispute, not over evidence, but over the legal principle that sent that evidence to a jury. That principle is not "settled, controlling law," Opp. 18, but rather the strained extension of single-incident liability to a scenario this Court never envisioned. Only because circuit courts have improperly interpreted this Court's jurisprudence—indeed, one footnote of it—did Thompson's claim survive dismissal. Pet. 17-26. Justice O'Connor predicted what would result from such an extension of *Canton*: "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident ... only invite[s] jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part).

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should not have applied the same test today to different *Brady* violations.

[7] Thompson is flatly wrong about *Cousin*. Opp. 26. That decision addressed the office's *Brady* record over a twenty-five year period that included Thompson's 1985 robbery conviction, as the Petitioners and Judge Clement carefully explained. *See* Pet. 24-25 & n.24; Pet. App. 25a.

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The Court should thus grant certiorari to resolve the confusion fomented by its own case law. No matter how deep the circuit disagreement, the Court regularly takes cases to temper application of precedent.[8] That is particularly so where the extent of government liability is at stake. *See, e.g., Sosa*, 542 U.S., at 701 (rejecting circuit courts' exception to federal tort immunity that threatened to swallow a significant exemption). Since the Court's "precedents frame the question presented, but ... do not answer it," *Indiana v. Edwards*, 128 S. Ct. 2379, 2383, only this Court can settle the matter.

The Court's resources are well spent in clarifying the extent of municipal liability. The

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[8] *See, e.g., Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638-39 (2009) (reviewing application by divided *en banc* circuit court of Court's fourth amendment and qualified immunity cases); *Bobby v. Bies*, 129 S. Ct. 2145, 2149 (2009) (rejecting circuit court's application of double jeopardy and issue preclusion law to *Atkins* claim); *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2319 (2009) (overturning appellate court's extension of due process rights to postconviction DNA testing); *Washington State Grange v. Washington State Repub. Party*, 128 S. Ct. 1184, 1192 (2008) (reviewing circuit court's interpretation of Court's election law precedents); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (clarifying application of Court's first amendment jurisprudence to job-related public speech); *Brown v. Payton*, 544 U.S. 133, 140-41 (2005) (reversing divided *en banc* circuit court's application of *Boyde v. California*, 494 U.S. 370 (1990)); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (reviewing circuit court's interpretation of federal environmental management statutes under the APA); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 828-29 (2002) (resolving whether "arising under" language in 28 U.S.C. § 1331 encompassed counterclaims).

original *Monell* opinion found "no occasion to address ... what the full contours of municipal liability under § 1983 may be." 436 U.S., at 695. Concurring, Justice Powell forecast that "[d]ifficult questions remain for another day," such as "substantial line-drawing problems in determining when execution of a government's policy or custom can be said to inflict constitutional injury such that government as an entity is responsible under § 1983." *Id.*, at 713 (Powell, J., concurring) (quotations omitted). Twenty years later, three Justices in *Bryan County* lamented that *Monell* has "produced a body of law that is neither readily understandable nor easy to apply." 520 U.S., at 433 (Breyer, J., dissenting). Thus, it is no surprise that a knotty problem in the failure-to-train area has arisen and persisted, demanding this Court's attention.[9]

CONCLUSION

The time is ripe to revisit the contours of failure-to-train liability, which the Court last addressed in 1989. Even then, three concurring Justices cautioned that "the resources of local government are not inexhaustible," and therefore warned:

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[9] The Fifth Circuit's overextension of *Canton* also undermines the absolute immunity that shields prosecutors from failure-to-train claims, as Chief Judge Jones explained in her separate dissent. *See* Pet. 33-36; Pet. App. 2a-7a; *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). Thompson offers no pertinent rejoinder to this related, but distinct, reason for granting certiorari. *See* Opp. 27-28.

> [t]he grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident.

Canton, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). Yet that is precisely what this case and others like it have done. The unwarranted extension of single-incident liability to a *Brady* violation dissolves actual fault into vicarious fault and threatens the operation of district attorneys' offices across the nation.

The Court should grant certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

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Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National District Attorneys Association (NDAA) was formed in 1950 and is the oldest and largest professional organization in the world representing criminal prosecutors. The NDAA's members are responsible for prosecuting criminal violations in every state and territory of the United States, and they are found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors.

The NDAA was formed to provide a national perspective for issues arising in local prosecutors' offices and to advocate at a national level for prosecutors on those issues. The association also seeks to foster and maintain the honor and integrity of the prosecuting attorneys of the United States, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties were notified ten days prior to the due date of this brief of the intent to file. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

The interests of the NDAA and its members are directly implicated by this case because it involves a $15 million judgment against a local district attorney's office for alleged violations committed by prosecutors found to have been inadequately trained in their obligations to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That judgment threatens to cripple the local district attorney's office and hamper its performance of its essential functions. The judgment will also constrain the office's future efforts to prevent violations, of whatever type, by diverting valuable funds and resources. And the alarming prospect for similar judgments in other offices across the country based on similar claims implicates the NDAA's national mission even more directly.

This case represents the latest development in a conflict in the circuit courts over the proper approach to failure-to-train claims seeking to hold municipal entities, like a district attorney's office, liable under 42 U.S.C. §1983 based on harms stemming from a single violation of a plaintiff's rights. As a national organization, the NDAA has a significant interest in seeing that conflict in the law resolved and a uniform approach to single-incident municipal-liability claims adopted that appropriately recognizes the need to retain heightened standards for imposing liability against municipal entities like district attorney's offices.

SUMMARY OF THE ARGUMENT

Since the Court first recognized that a single-incident may, in some limited circumstances, support holding municipal entities such as district attorney's offices liable for failing to adequately train employees, the Court has consistently stressed that plaintiffs must satisfy stringent culpability and causation requirements to prevail. Heightened culpability and causation ensures that municipalities are not held vicariously liable for employees' torts under *respondeat superior* liability, which would be constitutionally suspect as well as incompatible with the text of §1983.

Four circuits have addressed whether and when a failure-to-train theory may produce municipal liability for a single-incident involving a *Brady* violation by a prosecutor or police officer. Those circuits, including the Fifth Circuit in this case, have achieved inconsistent results using competing and conflicting analytical frameworks. Further, the Fifth Circuit's decision erroneously erodes the heightened culpability and causation standards that properly limit municipal liability. Indeed, the Fifth Circuit's ruling opens the way to *de facto respondeat superior* municipal liability, which defies the Court's clear precedent and will seriously and adversely affect the administration of justice. The Court should grant certiorari to clarify this confusion.

The issues presented by the Fifth Circuit's decision are of great concern to the NDAA. The

decision, which affirmed a $15 million judgment against the Orleans Parish District Attorney's Office that is roughly equal to the office's annual operating budget, threatens to bankrupt the office. And similar future decisions across the country, which would be authorized by the Fifth Circuit's ruling, could cripple the administration of justice across the country. Indeed, large judgments like the one in this case hamstring district attorney's offices' ability to implement training programs to prevent future violations just like the one complained of here.

ARGUMENT

I. THE COURT SHOULD PRESCRIBE A UNIFORM APPROACH FOR SINGLE-INCIDENT FAILURE-TO-TRAIN CLAIMS.

In three cases—*Monell* v. *N.Y. City Department of Social Services*, 436 U.S. 658 (1978), *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986), and *Canton* v. *Harris*, 489 U.S. 378 (1989)—the Court addressed and expanded §1983 municipal liability. Each time, however, the Court reiterated that §1983 municipal liability must not permit holding a municipality liable on a theory of *respondeat superior*.

Since *Canton*, including after the Court's subsequent decision in *Board of Commissioners of Bryan County* v. *Brown*, 520 U.S. 397 (1997), lower courts have struggled to properly apply *Canton*'s holding and balance its expansion of municipal liability with

the bedrock requirement that municipal liability may not be eroded into *de facto respondeat superior* liability.

Single-incident failure-to-train claims involving *Brady* violations have presented a particularly difficult challenge. Four circuits have reached disparate results under conflicting analyses. The Fifth Circuit's decision in this case highlights and increases that conflict and confusion. It also culminates a steady erosion of heightened culpability and causation requirements, which effectively endorses the *de facto respondeat superior* liability against which this Court has previously clearly warned.

A. The Court Has Consistently Recognized That §1983 Municipal Liability Must Not Become *Respondeat Superior* Liability.

In *Monell* v. *N.Y. City Department of Social Services*, 436 U.S. 658 (1978), the Court allowed for municipal liability under §1983 in limited circumstances, when a municipal employee enforces an official municipal policy or custom that itself violates a plaintiff's federal right. *Id.*, at 694. But the Court emphasized that §1983 liability requires that the government policy cause the harm. *Id.*, at 694. "[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.*, at 691.

The Court's reasoning relied both on §1983's text, which requires a causal link between the alleged §1983 violation and an action attributable to the municipality, *id.*, at 692, and Congress's concern when it passed §1983 that it was not constitutionally authorized to oblige municipalities to control the illegal acts of others. *Id.*, at 655-683.

After *Monell*, in *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986), the Court held that municipalities may be found liable under §1983 for federal-rights violations by official policymakers even absent an official policy. The Court, however, carefully preserved *Monell*'s causation requirement that distinguishes municipal liability from *respondeat superior* liability. *Ibid.*

The Court, next, in *Canton* v. *Harris*, 489 U.S. 378 (1989), permitted a plaintiff to sue for harms suffered at the hands of nonpolicymaking employees, when those harms resulted from a policymaker's failure to adequately train lower-level employees. *Id.*, at 387. At the same time, however, *Canton* recognized that failure-to-train cases present an increased danger that a municipality will wrongly be "held liable solely for the actions of its employee." *Board Of Commr's of Bryan County* v. *Brown*, 520 U.S. 397, 405 (1997); *Canton*, 489 U.S., at 387. Accordingly, the Court held that such cases require "rigorous standards of culpability and causation," under which a plaintiff must demonstrate a "direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S., at 404-405;

Canton, 489 U.S., at 385. Further, the policymaking official's failure to train must have resulted from deliberate indifference to the risk that a violation of a particular right would result. *Canton*, 489 U.S., at 388-392. Together, the required showings of deliberate indifference and direct causation of the plaintiff's alleged harm by the municipality's actions prevent municipal liability for failure to train from becoming forbidden *respondeat superior* liability. *Id.*, at 415.

The Court in *Canton* also posited that, in limited circumstances, a single constitutional violation might satisfy the stringent culpability and causation standards in a failure-to-train case. 489 U.S., at 390, n.10. But, in *Canton* and subsequently, the Court has made clear there is a particular need for rigorous culpability and causation standards in single-incident cases. *Bryan County*, 520 U.S., at 408. The Court has not revisited single-incident failure-to-train claims since *Canton*, coming closest in *Bryan County*, which involved a single-incident claim based on a failure to adequately screen an applicant for employment. *Id.*, at 404.

B. The Circuits Have Adopted Inconsistent Analytical Approaches to Single-Incident *Brady* Claims Asserted Under *Canton*.

In the almost three decades since *Canton*, the circuits courts have struggled and failed to adopt a consistent approach to single-incident failure-to-train

claims premised on a violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Instead, four circuits' decisions applying this Court's precedents on heightened culpability and causation have reached inconsistent outcomes using different analytical approaches. The decision in this case, affirmed by a sharply divided en banc Fifth Circuit, only deepens the inter-circuit uncertainty and conflict.[2]

The Eighth Circuit, in *Reasonover* v. *St. Louis County*, 447 F.3d 569 (CA8 2006), applied a strict standard of causation in affirming summary judgment for the defendant on single-incident claims for failure to train police and prosecutors on their duties under *Brady*. *Id.*, at 583-584. The court held that the plaintiff could not satisfy either the heightened culpability or causation requirements, because of undisputed evidence that the officer and prosecutor knew they had *Brady* obligations and that the policy of the prosecuting attorney's office was to disclose all *Brady* materials. *Id.*, at 583.

The Second Circuit's approach, in *Walker* v. *New York*, 974 F.2d 293, 300 (CA2 1992) and *Amnesty America* v. *Town of West Hartford*, 361 F.3d 113 (CA2 2004), contrasts with that of both the Eighth and Fifth Circuits. In *Amnesty America*, the Second Circuit applied a robust view of the heightened

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[2] The petition's more extended analysis of the conflict and confusion in the circuits is insightful, and the amicus agrees with it. See Pet. at 17-22.

causation requirement, in order to ensure that "a failure to train theory does not collapse into *respondeat superior* liability." 361 F.3d, at 130. The court stressed that "[i]t is impossible to prevail on a claim that the [ ] training program was inadequate without any evidence as to . . . how better or different training could have prevented the challenged conduct, or how 'a hypothetically well-trained officer would have acted under the circumstances.'" *Ibid.* Having failed to "rule out those causes" of the violation attributable to factors other than a lack of training—like "negligent or intentional disregard of [ ] training" or an existing policy—the plaintiff could not prevail on his claims. *Ibid.*

At the same time, however, *Amnesty America* reaffirmed the Second Circuit's prior holding in *Walker*, 974 F.2d, at 300, that a single *Brady* violation may support a finding of deliberate indifference against a district attorney's office in a failure-to-train case. *Amnesty America*, 361 F.3d, at 130, n.10. The Second Circuit's analytic framework for deliberate indifference in cases alleging prosecutorial *Brady* violations—a three-part test developed in *Walker*, 974 F.2d, at 294-295, 296-297—has not been followed by any other circuit. Further, the Second Circuit's *Walker* analysis is in tension with the Fifth Circuit's view, since *Walker* acknowledged that its test, developed in a case involving impeachment evidence, might not apply to exculpatory evidence like that at issue in this case. See *Walker*, 974 F.2d, at 300 ("[T]here might have been no need in 1971 to train

ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime.").

Finally, the Sixth Circuit, in two recent cases, has taken its own separate approach. With respect to heightened culpability, in both *Gregory* v. *Louisville*, 444 F.3d 725, 753 (CA6 2006), and *Moldowan* v. *Warren*, 578 F.3d 351, 393 (CA6 2009), the Sixth Circuit has recognized, like the Fifth Circuit, that a single *Brady* violation may support a finding of deliberate indifference in a failure-to-train case. The Eighth Circuit, however, declined to take that step in *Reasonover*.

The Sixth Circuit's stance on heightened causation, however, is far weaker than the Second or the Eighth Circuit's, while still being significantly more robust than the Fifth Circuit's. In *Gregory*, for instance, the court found heightened causation because there was no training at all regarding the handling of exculpatory *Brady* material and evidence showed that "officers were confused about their *Brady* obligations." 444 F.3d, at 754; but see, *Amnesty America*, 361 F.3d, at 130.

The Fifth Circuit's opinion in this case has merely complicated the lack of uniformity in the circuits. The Fifth Circuit's deliberate-indifference standard is in tension with the Second Circuit's *Walker* test and the Eighth Circuit's approach. And, the Fifth Circuit's approach to causation is out of step with the Eighth, Second, and even Sixth Circuit's views—under any of which, this case could easily

have had a different result. The Fifth Circuit upheld causation on a record that reflects, at most, diffuse disagreement in the district attorney's office about what *Brady* required and, in fact, is far more consistent with an intentional violation of known ethical and legal obligations, a classic employee intentional tort that no amount of training could prevent. See Pet. at 23, 26-30.

The Fifth Circuit's ruling deepens the confusion on the proper deliberate-indifference and causation analyses in single-incident failure-to-train cases of municipal liability, issues on which three other circuits have already staked out inconsistent positions. The Court's guidance is needed to clear up this confusion.

II. THE ISSUES RAISED BY THE PETITION ARE OF PARTICULAR CONCERN TO THE NDAA.

A. Large Jury Verdicts Against District Attorney's Offices Will Cripple Their Ability to Function and to Prevent Future Violations.

"[T]he resources of local government are not inexhaustible." *Canton*, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). The jury's award in this case of $14 million in damages and a further $1 million in attorneys' fees will stagger the Orleans Parish District Attorney's Office, which has been forced to consider bankruptcy to prevent the

asset seizure that may result from enforcement of the judgment. See Financial Woes Could Halt Justice System, WDSU.com, Jan. 7, 2009, http://www.wdsu.com/money/18426227/detail.html. Beyond this case, district attorney's offices across the country face dire budgetary conditions for the foreseeable future. State budgets throughout the country are reeling in the wake of the recent financial crisis, and budget shortfalls are predicted to afflict 48 states in fiscal years 2010 and 2011. *E.g.*, McNichol & Johnson, Recession Continues to Batter State Budgets; State Responses Could Slow Recovery, Center on Budget and Policy Priorities, http://www.cbpp.org/cms/?fa=view&id=711 (last visited December 1, 2009). Similar shortfalls are predicted for 2012. *Ibid.*

The imposition of a judgment like the one in this case, based on single-incident conduct, threatens a district attorney's office's performance of its essential public functions and constrains its ability to take prophylactic steps to avoid future violations. The Orleans Parish District Attorney's office, for example, has an annual operating budget roughly on par with the amount of the judgment, leaving it scant room for anything other than satisfying the judgment. See Bohrer, Court Upholds $14 Million Judgment Against Orleans DA's Office, Assoc. Press, Aug. 11, 2009. As Justice O'Connor noted over 20 years ago, the "grave step" of prompting a shift in the allocation of scarce resources means that some "services will necessarily suffer, including those with far more direct implications for the protection of constitutional rights."

Canton, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). It is important that the Court take up the questions presented by the petitioners to prevent the Fifth Circuit's decision from shifting resources away from prosecution and training and towards paying judgments for past single incidents of misconduct.

B. The Circuits' Continuing Confusion and the Advent of Municipal *Respondeat Superior* Liability Will Have Serious Adverse Consequences.

The NDAA is concerned by the circuits' ongoing confusion over the application of heightened culpability and causation requirements in single-incident failure-to-train cases, and especially concerned by the starkly divided en banc Fifth Circuit's approval of an erosion of those standards that effectively opens the door to *respondeat superior* liability for municipal prosecutors' offices. As a national association devoted to providing a nationwide perspective on issues affecting its members, including developing and implementing nationwide training programs, the NDAA strongly favors resolution of the conflicting standards for municipal liability that have emerged in the circuit courts. The NDAA also advocates eliminating the potential for differing outcomes in municipal-liability cases from circuit to circuit, which clarification from this Court would provide.

Moreover, the Fifth Circuit's complete deterioration of both the heightened causation and culpability requirements is of utmost concern to the NDAA, because it will have far-reaching consequences for the NDAA's members and their ability to perform their official functions. The Court has recognized that "adopt[ing] lesser standards of fault and causation would open municipalities to unprecedented liability," as it essentially will apply "*de facto respondeat superior* liability." *Canton*, 489 U.S., at 391-392. Under such loosened standards, the volume of failure-to-train suits will inevitably increase because in "virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Canton*, 489 U.S., at 391-392. Such suits would not be limited to claims stemming from *Brady* violations, as relaxed culpability and causation would permit liability "against any prosecutor's office for nearly any error that leads to a reversal of a conviction," including errors relating to "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." *Thompson* v. *Connick*, 578 F.3d 293, 304 (CA5 2009) (en banc) (Clement, J., urging reversal).

Moreover, federal courts will be called to adjudicate those claims, forcing them to engage "in an endless exercise of second-guessing municipal employee-training programs." *Canton*, 489 U.S., at 391-392. That is "an exercise . . . the federal courts are ill

suited to undertake" and that implicates "serious questions of federalism." *Ibid.* Public perception of the criminal justice system will deteriorate as the frequency of collateral suits inevitably increases, as will the public's perception of the "independence of judgment exercised" in district attorney's offices that constantly face the threat of litigation. *Thompson*, 578 F.3d, at 294. (Jones, C.J., urging reversal).

Just as with suits against district attorneys in their individual capacities, suits against district attorney's offices will be brought years after the fact and place "unique and intolerable burdens" on those offices. *Imbler* v. *Pachtman*, 424 U.S. 409, 425-426 (1976). The Orleans Parish District Attorney's office, for instance, targeted a figure of almost 1,000 cases processed *each month* in 2009. City of New Orleans, Adopted 2009 Operating Budget, at 383, http://www.cityofno.com/Portals/Portal35/Resources/CNO_2009_Operating_Budget-Proposed1.pdf (last visited December 1, 2009). To add to that challenge the burden of defending against collateral suits arising out of long-distant past convictions will strain such offices' resources immensely.

Finally, and perhaps most importantly, the manner in which district attorneys and their assistants perform their official duties will also be affected. The threat of exposing the office to municipal liability will encourage district attorneys to act, and to instruct assistants to act, so as to avoid any potential litigation risks to the office. That, in turn, will affect the

manner in which they perform their duties. Prosecutors, after all, "inevitably make[ ] many decisions that could engender colorable claims of constitutional deprivation." *Van de Kamp* v. *Goldstein*, 129 S.Ct. 855, 860 (2009).

CONCLUSION

For these reasons, the NDAA urges the Court to grant the petitioners' writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE ORLEANS PARISH ASSISTANT DISTRICT ATTORNEYS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This *Amicus Curiae* Brief is filed in this Honorable Court on behalf of the ninety (as of filing) Assistant District Attorneys who daily represent the interests of the State of Louisiana in the various state and federal courts of Orleans Parish. These ninety *amici* have a profound interest in the continuing viability of the District Attorney's Office as a cornerstone of the maintenance of peace and order in the City of New Orleans. They represent the current generation of prosecutors dedicated to securing justice—zealously, faithfully, and ethically—on behalf of the citizens of the great city of New Orleans, and who receive that torch from the many generations that have taken the same Oath before them.

Amici now stand face-to-face with a $15,000,000 district court judgment against their Office that, as stands, likely threatens their careers as well as the very well-being of the city and people that they serve. Furthermore, they share a firm belief that the judgment in this case was improperly obtained under the controlling law, and, thus, that they are being

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), undersigned counsel avers that the instant *amicus* brief is being filed earlier than 10 days before the filing deadline, and that counsel for Respondent have received notice of such filing and have orally consented to it. Written consent and waiver forms will be sent to counsel for Respondent and filed in this Court once received. As such, no Motion for Leave to File accompanies this Brief.

unjustly deprived by the self-serving and intentional act of a single prosecutor whose actions did not, and do not, represent the prevailing culture of their Office, but rather defy those values. Accordingly, as those who would be most immediately affected by an adverse judgment—through staff reductions, seizure of Office assets, and harm to their professional reputations—*amici* seek a voice in the decision the consequences of which will reverberate for the rest of their careers.

Amici assert that the accompanying brief is both relevant and desirable to the disposition of this case. Significant issues exist regarding § 1983 municipal liability under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 685 (1978), and its progeny. Specifically, *amici* seek to address the propriety of holding a municipal employer liable for a single constitutional violation where there is no pattern or practice of such violations and, most importantly, where the actions and words of the actor employee reasonably demonstrate that he acted in full awareness of both his duty and the violative nature of his conduct, such that the municipality cannot be held to have been "deliberately indifferent" to the need to train under this Honorable Court's established and stringent standards of liability.

SUMMARY OF THE ARGUMENT

In writing on behalf of six judges of the Fifth Circuit Court of Appeals in favor of reversal of the judgment, Judge Edith Brown Clement found it "imperative" to counsel that the result in the instant case risked encouraging the extension of single incident municipal liability beyond the "most limited

circumstances" under which the law of this Court has unequivocally held that it may be found.[2]

The danger posed by the Fifth Circuit's divided affirmance of the verdict in favor of Thompson is precisely the progressive unraveling of the tightly-woven standards for finding such liability based on a single incidence of a failure to train municipal employees. *Monnell* and *City of Canton* establish an exceedingly high bar for plaintiffs seeking to hold a municipality liable for the wrongs of its employees in such cases, the stringency of which has been emphasized repeatedly by this Court: municipalities may not be held liable on a *respondeat superior* theory; the need for training must be *obvious*; the municipality must be *deliberately* indifferent to the need to train; the failure to train must be the *driving force* behind the constitutional violation.

The situation confronting courts across the United States, as presented in this case, is ripe for certiorari by this Court precisely because its continued affirmance threatens to defang the strict standards above, and further blur the line between *Monell/City of Canton* liability and *respondeat superior* in factual scenarios, like the one here, where the very nature of a municipal employee's bad act reasonably demonstrates that: *no* amount of training could have prevented the constitutional violation; the need for training could *not* have been sufficiently obvious, and; no failure to train could have been the *driving force* behind the constitutional violation.

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[2] *See Thompson* v. *Connick*, 578 F.3d 293, 295-6 (5th Cir. 2009).

To hold municipalities liable in such situations works a grave and undeserved wrong and punishes them for acts of their employees that could not possibly have been prevented. Thus, the continued judicial approval of findings of liability on facts such as exist in the instant case—scenarios which confront not just prosecutor's offices, but sheriff's offices and police departments nationwide on a daily basis—will have a severe and negative impact on the criminal justice system as a whole.

As such, this Court should consider the issues presented herein in support of granting the pending Petition for Certiorari.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION THAT DIRECTLY IMPLICATE THE STRINGENT STANDARDS IMPOSED UPON § 1983 PLAINTIFFS IN SUITS INVOLVING THE *INTENTIONAL AND KNOWING* VIOLATION OF A CONSTITUTIONAL RIGHT BY A MUNICIPAL EMPLOYEE.

A. The recent intersection of two lines of decisions by this Court—involving municipal liability and prosecutorial immunity—presents important and unanswered questions about the extent of municipal liability for the intentional and knowing acts of an employee.

This Court established in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), that a municipality cannot be held liable under § 1983 for the unconstitutional acts of its employees based merely on

its status as their employer. Furthermore, the *Monell* court established that some municipal policy or custom must in fact be the "moving force" behind the constitutional violation. 436 U.S. at 694; 98 S.Ct. at 2038. That is, "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985).

In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), this Court acknowledged that *Monell* liability could be based on a single incidence of a constitutional violation caused by a municipality's failure to train its employees where the potential for constitutional violation due to lack of training is so obvious that the municipality can be said to have been deliberately indifferent to the need to train. 489 U.S. at 390, n.10, 109 S. Ct. at 1205, no. 10. The *Harris* Court appropriately established an exacting standard for finding liability under a failure to train theory where there is no pattern of previous constitutional violations, which has been repeatedly reaffirmed by the federal courts. *See Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 385-86 (5th Cir. 2005); *Pineda v. City of Houston*, 291 F.3d 325, 334-35 (5th Cir. 2002); *Burge v. St. Tammany Parish*, 187 F.3d 452, 471-72 (5th Cir. 1999); *Snyder v. Trepagnier*, 142 F.3d 792, 798-99 (5th Cir. 1998); *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388, 137 L. Ed. 2D 626 (1997). In fact, in only one case before the subject of the the instant petition has the Fifth Circuit upheld a finding of liability based on a single incident. See *Brown v. Bryant County*, 219 F.3d 450 (5th Cir. 2000).

Accordingly, there exists a well-established analytical framework for analyzing municipal failure to train claims based on a single constitutional violation: How obvious should the need to adequately train an employee have been to the municipality? Was the ensuing constitutional violation a highly predictable consequence of not training that employee? Was the failure to train the moving force that had a specific causal connection to the constitutional injury? In other words, does the evidence establish, under the "stringent standards" of this Court, "unmistakable culpability and clearly connected causation"? *Brown*, at 461 (citing *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 117 S.Ct. 1382 (1997)).

Of the myriad cases exploring the issue of single-incident liability for failure to train, however, none explores specifically what, in light of the instant case, has come to the fore as a highly relevant issue: the *nature* of the offending employee's conduct—the relevant facts and circumstances that may reasonably demonstrate that an employee who violated a citizen's rights did so intentionally, with full knowledge of the unconstitutional or illegal nature of his acts. This is so even though this very Court has voiced its concerns over finding liability in such situations.

In fact, in *City of Canton*—the case in which the single-incident exception was first recognized—Justice O'Connor, concurring in part and dissenting in part, observed that "[t]he central vice of [§ 1983], as noted by the Court's opinion in *Monell*, was that it 'impose[d] a species of vicarious liability on municipalities since it could be construed to impose liability even if the municipality *did not know of an impending or ensuing riot or did not have the wherewithal to do anything*

about it.'" 489 U.S. at 395, 109 S.Ct. at 1208 (quoting *Monell*, 436 U.S., at 692, n. 57, 98 S.Ct., at 2036, n. 57) (emphasis added)).

Justice O'Connor's concern regarding a municipality's inability to control the acts of an employee whose actions and words reasonably demonstrate that he *intentionally* violated a citizen's constitutional rights is especially significant in light of this Court's reasoning that "[section] 1983 was intended not only to provide compensation to the victim's of past abuses, *but to serve as a deterrent against future constitutional deprivations* as well." See *Robertson v. Wegmann*, 436 U.S. 584, 590-91, 98 S.Ct. 1991, 1995 (1978) (emphasis added). A legitimate question exists, then, as to the value of § 1983's deterrent effect on a municipality in situations in which it has no ability to deter the unconstitutional actions of a particular employee.

Most recently, in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009), Justice Breyer, writing for a unanimous Court, further emphasized this Court's concerns over the potential negative systemic consequences of a municipal employee's intentional bad act. Although dealing directly with the issue of an individual supervisor's failure to train and monitor, the Court highlighted the office-wide "practical anomalies," see *Van de Kamp*, at 863, that allowing liability to attach in such situations could engender:

> A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can

> personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office-wide supervision and training, would not. Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler* [v. *Pachtman*,424 U.S. 409 (1976)].

Id. (emphasis in original).

Accordingly, with *Van de Kamp* this Court's jurisprudence has arrived at a crossroads between two lines of cases—one concerning municipal liability for the acts of employees, the other concerning the extent of prosecutorial immunity for trial-related acts. At the heart of the intersection between the two lie several unanswered questions suggested by Justice Breyer and presented in the instant petition: to what extent should a municipality be liable for the intentional wrongs of its employees under circumstances which reasonably demonstrate that the employee knew that his actions were wrong and yet performed them anyway? How much liability, if any, may be imputed to the municipality that "did not know of an impending or ensuing [act] or did not have the wherewithal to do anything about it?" What significance should be given to the difference between bad training and bad character?

B. Leaving these questions unresolved will have major implications for the criminal justice system nationwide.

The implications of leaving such an important question unresolved will have significant and immediate consequences for the entire criminal justice system nationwide—from street-level arrests to undercover investigations to prosecution. Police departments, sheriff's offices and prosecutors' offices across the country will be under constant threat of possibly crippling lawsuits due to the intentional and knowing actions of their employees which violate the rights of citizens, but over which the municipal entity has no control regardless of the level of training provided or even the need for training in the first place.

This fear is supported statistically by the sheer volume of activity logged by police, sheriff's and prosecutors' offices in a given year. For example, there were approximately 14,382,900 arrests made nationwide in 2006 alone.[3] On average, this results in over 39,000 situations *every day* in which a law enforcement officer had the opportunity to commit an intentional violation of an arrestee's constitutional rights, the facts and circumstances of which may reasonably have demonstrated that his or her municipal employer should not have known of the need

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[3] Source: Estimated arrests of all persons in the United States, 2000-2006, per FBI Arrest Statistics, Office of Juvenile Justice and Delinquency Prevention (OJJDP), Office of Justice Programs, U.S. Department of Justice; available at: http://ojjdp.ncjrs.org/ojstatbb/ezaucr/asp/ucr_display.asp (last accessed 9/14/2009).

to train or that no amount of training would have prevented the violation. New Orleans alone saw 53,382 arrests made in 2008—roughly 146 per day.[4]

On the prosecution side, the Orleans Parish District Attorney's Office accepted charges in 4,968 cases stemming from felony arrests in 2007, which led to 1,977 criminal convictions, or five-and-a-half each day.[5] In each of those cases, as in the instant case, the opportunity existed for an individual assistant district attorney to knowingly and willfully violate a defendant's constitutional rights in situations where the facts and circumstances may reasonably have demonstrated that the district attorney should not have known of the need to train or that no amount of training would have prevented the violation. As the instant case shows, even a *single* such violation can lead to the imposition of multi-million dollar liability upon an office which forms perhaps the keystone of the local justice system. Multiplied over a thousand times, that risk becomes almost incalculable.

C. This case presents an excellent vehicle for addressing the questions presented.

The factual scenario underlying the instant case presents an ideal platform for analyzing the issues relating to municipal liability acts of employees

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[4] Source: Orleans Parish Criminal Justice Accountability Report, Spring 2009, Metropolitan Crime Commission, Inc.; available at: http://www.metropolitancrimecommission.org/html/documents/NOCJSOversightProjectSpring2009Report.pdf (last accessed 9/14/2009).

[5] *Id.*

wherein the facts and circumstances surrounding the conduct reasonably demonstrate that the employee acted intentionally and knowingly, such that the municipality can not be held to have known of the need for training and such that it is unreasonable to presume that any training would have prevented the unconstitutional conduct.

The facts of the instant case reveal that Thompson was charged first with the murder of Raymond Liuzza and subsequently with the armed robbery of the Lagardes. However, prosecutors elected to try Thompson for the robbery first, knowing that a conviction on that charge could (1) prevent Thompson from testifying in his defense at the murder trial, and (2) be used as an aggravating factor in securing a death sentence following conviction for the murder.[6] It was in the armed robbery trial that the exculpatory blood evidence and lab report were intentionally suppressed.

Two days before Thompson's armed robbery trial began, the NOPD crime lab sent a report to Bruce Whittaker, the screening attorney, indicating that the perpetrator's blood, as determined from a sample he had left on Jay Lagarde's pant leg, was type 'B'[7] Whittaker stated that he placed the report on James Williams' desk—as Williams was the lead prosecutor in the armed robbery case—but Williams claimed never to have seen it.[8] On the morning of the first day

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[6] *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008).

[7] *Id.* at 844.

[8] *Id.*

of Thompson's armed robbery trial, Jerry Deegan checked the evidence—including the bloody swatch of pants leg—out of the NOPD evidence room; he then checked the evidence into the courthouse property room—with the glaring exception of the bloody swatch.[9]

At trial, Williams never mentioned any blood evidence and relied entirely on witness testimony in securing a conviction for attempted armed robbery against Thompson.[10] Due to this conviction, Thompson elected not to testify at his murder trial, and he was found guilty by the jury. During the penalty phase, Williams elicited testimony from the Lagardes about Thompson's attempt to rob them and Williams emphasized that fact in his closing argument as proof that Thompson merited the death penalty.[11] The jury sentenced Thompson to die.[12]

Nine years after Thompson's conviction, but before the exculpatory lab report was discovered, Deegan confessed to former fellow assistant district attorney Mike Riehlmann that he had intentionally withheld the exculpatory blood evidence in Thompson's armed robbery trial.[13] Upon the discovery of the missing lab report 1999, Riehlmann reported Deegan's confession

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 844-45.

[12] *Id.* at 845.

[13] *Id.*

and District Attorney Connick moved to vacate the armed robbery conviction and stay Thompson's execution.[14]

The facts also reflect that Deegan, Williams, and all other assistants in Connick's office received instruction on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), in law school, prior to their employment; that office policy at the time of Deegan's withholding of the blood evidence dictated that all lab reports be turned over to the defendant; and that there had only been four confirmed *Brady* violations out of Connick's office in the ten years preceding Thompson's trial.[15]

Accordingly, the instant case contains sufficient facts on which this Court may conduct a through analysis of the issues presented. Deegan's presumptively suspicious actions—returning all but the exculpatory blood evidence to the property room after Thompson's armed robbery trial; maintaining that secret for another decade; revealing on his death bed that he *intentionally* withheld the exculpatory evidence—may reasonably demonstrate that he knew what his obligation under *Brady* was and that he was violating it. As such, and coupled with the severe dearth of previous *Brady* violations out of his office, it may be reasonably argued that Connick had no reason to suspect that additional *Brady* training was required. Williams' decision not to use the blood evidence that was available to him may also reasonably demonstrate that he was aware of its

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[14] *Id.*

[15] *See generally*, *Thompson v. Connick*, 578 F.3d at 303-306.

exculpatory nature as well. Finally, Connick's post-disclosure move to vacate Thompson's robbery conviction reasonably demonstrates that he was taken off guard by the above acts of intentional deception.

Thus, this Court is presented with an ideal opportunity to determine finally whether, under such factual circumstances, it comports with fundamental ideas of fairness to hold a municipality liable for intentional and knowing acts of employees that in themselves reasonably demonstrate that an employer "did not know of an impending or ensuing [act] or did not have the wherewithal to do anything about it." Moreover, this case presents a scenario in which the very functioning of a major metropolitan prosecutor's office has been endangered because of a single act of intentional wrongdoing by one or more individual prosecutors, which act could have major implications on such offices nationwide in jurisdictions where those offices do not currently enjoy sovereign immunity. This Court should grant certiorari to answer the question of whether that municipal employer should continue to be held liable on a theory of bad training for constitutional violations which reasonably show their cause to be an employee's bad character.

CONCLUSION

For these reasons, the Orleans Parish Assistant District Attorneys respectfully urge the Court to grant the petitioners' writ of certiorari.

Respectfully submitted,

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JOINT APPENDIX

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No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX, Volume 1

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June 7, 2010

Petition for Writ of Certiorari filed November 6, 2009
Petition for Writ of Certiorari granted March 22, 2010

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Trial Exhibit 34: Thompson's Motion for Production of Exculpatory Evidence—Murder case ..... JA 648

Trial Exhibit 35: State's Answer to Thompson's Motion for Production of Exculpatory Evidence—Murder case ..... JA 651

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A:
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Appendix B:
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Appendix C:
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RELEVANT DOCKET ENTRIES

United States District Court for the
Eastern District of Louisiana (New Orleans)

2:03-cv-02045-CJB-ALC

John Thompson v. Connick, et al.

Date Filed	#	Docket Text
07/16/2003	1	COMPLAINT; 5 summons(es) issued (lg) (Entered: 07/18/2003)
		* * *
12/08/2003	11	ANSWER by defendant Harry F Connick, defendant Eddie Jordan, defendant Eric Dubelier, defendant James Williams, defendant Orleans Parish Dist to complaint by plaintiff John Thompson [1-1] (sek) (Entered: 12/10/2003)
		* * *
05/04/2005	34	AMENDED ANSWER to 1 Complaint by Harry F Connick, Eric Dubelier, Eddie Jordan, Orleans Parish District Attorney's Office, Unidentified Parties. (sek,) (Entered: 05/09/2005)
		* * *
07/19/2005	39	MOTION for Summary Judgment by Harry F Connick, Eric Dubelier, James Williams, Eddie Jordan, Orleans Parish District Attorney's Office. Motion Hearing set for 8/3/2005 09:30 AM before Judge

		Carl Barbier. (Attachments: # 1 exhibits)(sek,) (Entered: 07/21/2005)
		* * *
08/11/2005	44	RESPONSE/MEMORANDUM in Opposition filed by John Thompson re 39 MOTION for Summary Judgment. (sek,) (Entered: 08/11/2005)
		* * *
11/15/2005	60	ORDER granting in part and denying in part 39 defendants' Motion for Summary Judgment . Signed by Judge Carl Barbier on 11/15/05. (sek,) (Entered: 11/15/2005)
		* * *
09/25/2006	69	MOTION to Dismiss Party Eric Dubelier and James Williams by Eric Dubelier, James Williams. Motion Hearing set for 10/11/2006 09:30 AM before Judge Carl Barbier. (Attachments: # 1 Memorandum in Support # 2 Exhibits# 3 Notice of Hearing)(sek,) (Entered: 09/26/2006)
		* * *
10/03/2006	71	RESPONSE/MEMORANDUM in Opposition filed by John Thompson re 69 MOTION to Dismiss Party Eric Dubelier and James Williams. (Attachments: # 1 Exhibit)(sek,) (Entered: 10/04/2006)
10/10/2006	72	ORDER denying 69 Motion to Dismiss; Oral argument is CANCELLED. Signed by Judge

		Carl Barbier on 10/10/06. (sek,) (Entered: 10/10/2006)
		* * *
01/16/2007	82	PRETRIAL ORDER; jury trial set for 2/5/07 at 8:30 a.m., Signed by Judge Carl Barbier.(sek,) (Entered: 01/17/2007)
		* * *
02/01/2007	111	Minute Entry for proceedings held before Judge Carl Barbier : Telephone Conference held on 2/1/2007; all counsel present agreed that claims against Harry Connick personally had been dropped & the only remaining claims concered the defendants in their official capacities; a stipulation to that effect will be filed in the record: Ordered: that defendants' motion in limine to exclude photograph of James Williams is GRANTED; defendants' motion in limine to exclude evidence & issues which have already been litigated in plaintiff's prior habeas petition is DENIED; plaintiff's motion in limine to preclude defendants' attempts to re-litigate guilt or innocence in the murder case is GRANTED; defendants' motion in limine to exclude evidence of bar complaints is GRANTED; defendants' motion in limine to exclude evidence which has never been adjudicated to have been exculpatory nor improperly

		suppressed in violation of Brady is GRANTED IN PART, DENIED IN PART & DEFERRED IN PART; motion in limine to exclude evidence re grand jury proceedings is DENIED IN PART & DEFERRED IN PART; motion to compel attendance at trial of defendant Eric Dubelier is DISMISSED as moot; plaintiff's counsel will not be allowed to use the demostrative photographs as set forth in document; the Court deferred ruling on remainder of pending motions in limine & evidentiary objections. (sek,) (Entered: 02/01/2007)
		* * *
02/05/2007	136	Single Listing of all Uncontested Material Facts. (sek,) (Entered: 02/13/2007)
		* * *
02/06/2007	121	Minute Entry for proceedings held before Judge Carl Barbier : Jury Trial held on 2/6/2007. (Court Reporter Cathy Pepper.) (sek,) (Entered: 02/12/2007)
02/07/2007	122	Minute Entry for proceedings held before Judge Carl Barbier : Jury Trial held on 2/7/2007. (Court Reporter Cathy Pepper.) (sek,) (Entered: 02/12/2007)
02/08/2007	123	Minute Entry for proceedings held before Judge Carl Barbier : Jury Trial held on 2/8/2007; defendants re-urge judgment as a matter of

		law: as to policy making issues: ORDERED GRANTED as to Dubelier and Williams; ORDERED DENIED as to Connick in his official capacity as District Attorney; as to deliberate indifference claim: ORDERED DENIED. (Court Reporter Cathy Pepper.) (sek,) (Entered: 02/12/2007)
02/08/2007	135	MINUTE ENTRY: AMENDED MINUTES from Jury Trial held 2/8/07 123 ; defendants re-urge judgment as a matter of law: ORDERED DENIED. Signed by Judge Carl Barbier.(sek,) (Entered: 02/13/2007)
		* * *
02/09/2007	138	Minute Entry for proceedings held before Judge Carl Barbier : Jury Trial completed on 2/9/2007. (Court Reporter Cathy Pepper.) (Attachments: # 1 Exhibits) (sek,) (Entered: 02/13/2007)
		* * *
02/09/2007	140	Court's Jury Instructions. (sek,) (Entered: 02/13/2007)
02/12/2007	141	JUDGMENT entered in favor of John Thompson against Eddie Jordan, Eric Dubelier, Harry F Connick, James Williams in their official capacities, and the Orleans Parish District Attorney's Office, jointly and in solido in the amount $14,000,000.00, with legal interest from date of entry of judgment, and

		reasonable attorneys' fees & costs. Signed by Judge Carl Barbier on 2/12/07.(sek,) (Entered: 02/13/2007)
		* * *
02/23/2007	147	MOTION for Judgment as a Matter of Law by Harry F Connick, Eric Dubelier, James Williams, Eddie Jordan, Orleans Parish District Attorney's Office. Motion Hearing set for 3/21/2007 09:30 AM before Judge Carl Barbier. (Attachments: # 1 Memorandum in Support # 2 Exhibit # 3 Notice of Hearing # 4 Proposed Order)(Carver, Mark) (Entered: 02/23/2007)
02/23/2007	148	MOTION for New Trial, MOTION for Remittitur by Harry F Connick, Eric Dubelier, James Williams, Eddie Jordan, Orleans Parish District Attorney's Office. Motion Hearing set for 3/21/2007 09:30 AM before Judge Carl Barbier. (Attachments: # 1 Memorandum in Support # 2 Notice of Hearing # 3 Proposed Order)(Carver, Mark) (Entered: 02/23/2007)
02/23/2007	149	MOTION to Alter Judgment 141 Judgment, by Harry F Connick, Eric Dubelier, James Williams, Eddie Jordan, Orleans Parish District Attorney's Office. Motion Hearing set for 3/21/2007 09:30 AM before Judge Carl Barbier. (Attachments: # 1 Memorandum in

		Support # 2 Exhibit # 3 Notice of Hearing # 4 Proposed Order)(Carver, Mark) (Entered: 02/23/2007)
		* * *
03/27/2007	159	RESPONSE/MEMORANDUM in Opposition filed by John Thompson re 149 MOTION to Alter Judgment 141 Judgment. (Attachments: # 1 Proposed Order)(Glass, Robert) Modified on 3/28/2007 (sek,). (Entered: 03/27/2007)
03/27/2007	160	RESPONSE/MEMORANDUM in Opposition filed by John Thompson re 148 MOTION for New Trial MOTION for Remittitur. (Attachments: # 1 Proposed Order # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit)(Glass, Robert) (Entered: 03/27/2007)
03/27/2007	161	RESPONSE/MEMORANDUM in Opposition filed by John Thompson re 147 MOTION for Judgment as a Matter of Law. (Attachments: # 1 Proposed Order)(Glass, Robert) (Entered: 03/27/2007)
		* * *
04/23/2007	169	ORDER denying 147 Renewed Motion for Judgment as a Matter of Law; denying 148 Motion for New Trial or for Remittitur; ; denying 149 Motion to Alter Judgment. Signed by Judge Carl Barbier on 4/23/07. (sek,) (Entered: 04/23/2007)
		* * *

06/18/2007	182	ORDER re 156 Motion for Attorney Fees. Plaintiff should be awarded attorneys' fees in the amount of $1,031,841.79, expert fees in the amount of $90,916.61, and costs in the amount of $43,419.05. Signed by Judge Carl Barbier on 6/16/07. (gec,) (Entered: 06/18/2007)
		* * *
06/21/2007	184	JUDGMENT entered in favor of John Thompson against Eddie Jordan, Eric Dubelier, Harry F Connick, James Williams, in their official capacities, & the Orleans Parish District Attorney's Office, jointly and severally liable, awarding attorneys' fees, costs and expert fees, in the total amount of $1,166,177.45. Signed by Judge Carl Barbier on 6/21/07.(sek,) (Entered: 06/22/2007)
		* * *
12/07/2009	205	ORDER granting 195 Motion for Attorney Fees. FURTHER ORDERED that Plaintiff be awarded additional attorneys' fees in the amount of $524,984.80 and costs in the amount of $4,443.28. Signed by Judge Carl Barbier on 12/4/2009. (gec,) (Entered: 12/07/2009)
		* * *

United States Court of Appeals
for the Fifth Circuit

07-30443

John Thompson v. Connick, et al.

05/22/2007 Civil rights case docketed. NOA filed by Appellant Harry Connick, Appellant Eric Dubelier, Appellant James Williams, Appellant Eddie Jordan, Appellant Orleans Parish Dist. [07-30443]

* * *

12/19/2008 Opinion filed. Issd in T form? Y Mandate pull date is 1/9/09 in 07-30443, in 07-30663. [07-30443, 07-30663] (RMF)

12/19/2008 Judgment entered and filed. [07-30443, 07-30663] (RMF)

* * *

03/11/2009 COURT ORDER granting petition for rehearing en banc filed by Appellants Mr. Eddie Jordan, Mr. James Williams, Mr. Harry Connick, Mr. Eric Dubelier and Orleans Parish District Attorney's Office [6198504-2]; mooting petition for rehearing filed by Appellants Mr. Eddie Jordan, Mr. James Williams, Mr. Harry Connick, Mr. Eric Dubelier and Orleans Parish District Attorney's Office [6198492-2]; reopening case [6342504-2] Judge(s): EB. [07-30443, 07-30663] (GAM)

03/18/2009 LETTER OF ADVISEMENT. Reason: advising counsel of issues they should address in their en banc briefs [07-30443, 07-30663] (GAM)

* * *

08/10/2009 PUBLISHED EN BANC OPINION FILED. [07-30443 Affirmed 07-30663 Affirmed] Judge: EHJ , Chief Judge, dissenting: EGJ , Circuit Judge, Specially Concurring with EBC, Circuit Judges dissent: EBC, Circuit Judge, with whom EHJ, Chief Judge, and EGJ, JES, EMG, and PRO, Circuit Judges, join, dissenting: ECP, Circuit Judge, with whom CDK, JLW, CES, and JWE, Circuit Judges, join concurring. Mandate pull date is 08/31/2009 [07-30443, 07-30663] (JMA)

08/10/2009 JUDGMENT ENTERED AND FILED. [07-30443, 07-30663] (JMA)

* * *

08/27/2009 REVISED PUBLISHED OPINION FILED (EHJ DISSENT). [6340902-2] [07-30443, 07-30663] (RMF)

* * *

11/13/2009 COURT ORDER granting motion to extend stay of mandate pending disposition of petition for writ of certiorari to the United States Supreme Court filed by Appellants Mr. James Williams, Mr. Harry Connick, Mr. Eric Dubelier and

Orleans Parish District Attorney's Office, Appellants Mr. Eddie Jordan, Mr. James Williams, Mr. Harry Connick, Mr. Eric Dubelier and Orleans Parish District Attorney's Office [6404470-2] Judge(s): EHJ. [07-30443, 07-30663] (AGL)

11/18/2009 SUPREME COURT NOTICE that petition for writ of certiorari [6411639-2] was filed by Appellant Mr. Harry Connick in 07-30443 on 11/06/2009. Supreme Court Number: 09-571. [07-30443, 07-30663] (CAV)

* * *

03/25/2010 SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Harry Connick in 07-30443,07-30663 on 03/22/2010 limited to Question 1 presented in the petition [6498247-1]. [07-30443, 07-30663] (CAV)

SINGLE LISTING OF ALL UNCONTESTED MATERIAL FACTS

A. Raymond T. Liuzza, Jr. was shot and killed at approximately 12:40 a.m. near the 1700 block of Josephine Street in New Orleans, Louisiana.

B. NOPD detectives conducted the Liuzza murder investigation prior to the arrest of Messrs. Freeman and Thompson. Soon after the investigation began, a public announcement was made that a reward of $15,000 would be paid for information leading to the arrest and conviction of the murderer of Mr. Liuzza.

C. An eyewitness, Paul Schliffka, was standing on the corner of Josephine and Baronne Streets as the perpetrator ran by him, gun in hand, moments after the shooting of Mr. Liuzza.

D. Mr. Schliffka described the perpetrator to police as 6' tall with close-cut hair, a description that was included in police reports.

E. On January 17, 1985, the District Attorney's Office sought and received indictments of Kevin Freeman and John Thompson for the first-degree murder of Raymond T. Liuzza, Jr.

F. The day after Mr. Thompson's arrest for the murder of Mr. Liuzza, his photograph

appeared in THE NEW ORLEANS TIMES-PICAYUNE. A father of three youths who had been robbed in a carjacking outside the Superdome on December 28, ~~2004~~ 1985 saw the photograph, and surmised that Mr. Thompson may have been the perpetrator of the armed robbery. The father showed the photograph to two of his children, who indicated that the man in the photograph might have been the carjacker. The father contacted the Orleans Parish District Attorney's Office and reported the possibility that Mr. Thompson may have been the perpetrator of the December 28, ~~2004~~ 1985 robbery.

G. Mr. Dubelier and Mr. Williams secured an indictment of Mr. Thompson for armed robbery, and decided to use the armed robbery charge to the State's advantage in the murder case. Mr. Dubelier, who was appointed as a Special Prosecutor in the armed robbery case, decided that a conviction of Mr. Thompson on the armed robbery charge would effectively preclude Mr. Thompson from taking the witness stand in his own defense at the murder trial, and that the armed robbery conviction could be used in the penalty phase of the murder trial to obtain a death sentence. Accordingly, Mr. Dubelier and Mr. Williams moved to reverse the order of the trials, so that the armed robbery trial would be held approximately three weeks before the murder trial.

H. Mr. Dubelier and Mr. Williams moved to reverse the order of the trials, so that the armed robbery trial would be held approximately three weeks before the murder trial, an action that is not improper, illegal or unethical by Louisiana law.

I. Prior to the armed robbery trial, the defense moved for the production of any evidence favorable to the accused, including scientific evidence. Prior to the armed robbery trial, the prosecutors did not produce any scientific evidence or blood evidence.

J. At that time, however, the State had blood evidence from the armed robbery. The driver or the car, Stewart (Jay) LaGarde, had struggled with the perpetrator, kicking him in the face. The police cut a bloody swatch from LaGarde's pant leg containing the perpetrator's blood.

K. Shortly before the armed robbery trial, a prosecutor checked the bloody swatch out of the evidence locker and delivered it to the Police Crime Lab for testing. Two days before the trial, the Crime Lab prepared and delivered to the District Attorney's Office a report which showed that the perpetrator had type B blood. Mr. Thompson has type O blood.

L. Prior to the armed robbery trial, Mr. Thompson and his attorneys were not advised of the existence of the blood evidence, that the evidence had been tested,

that a blood type was determined definitively from the swatch obtained from the driver of the car, that the blood was that of the perpetrator.

M. On the morning of the first day of the armed robbery trial, Gerry Deegan, a prosecutor assigned to the Plaintiff's armed robbery trial, had checked the blood evidence out of the evidence locker along with other physical evidence (including the gun that had been recovered from the scene of the crime). After the trial, the gun and other physical evidence were checked back into Central Evidence and Property, but the physical blood evidence was never returned.

N. On April 11 and 12, 1985, Mr. Thompson was tried and convicted of attempted armed robbery based solely on the descriptions of the victims.

O. Defendants Dubelier and Williams were involved in reviewing the police reports and evidence, preparing the murder case against Mr. Thompson for trial, handling pretrial discovery and pre-trial motions, interviewing witnesses, and presenting the case on behalf of the State of Louisiana against Mr. Thompson at trial.

P. Mr. Thompson's attorneys in the murder case moved to preclude the prosecutors from using the attempted armed robbery conviction to impeach Mr. Thompson's testimony in the murder trial, but the State

opposed the motion, and the motion was denied.

Q. On May 6-8, 1985, Mr. Thompson was tried and convicted for the first-degree murder of Raymond T. Liuzza, Jr. As a result of his conviction three weeks earlier for attempted robbery and the denial of the motion to preclude the introduction of such evidence, Mr. Thompson did not take the witness stand and deny his guilt in the murder case.

R. At Plaintiff's murder trial, Freeman testified that he was driving Mr. Thompson in Freeman's car when the car ran out of gas, and that he parked the car on Josephine Street, near Carondelet, several blocks river-side of the location where Mr. Liuzza was shot and killed. Freeman testified that he and Mr. Thompson began walking from this location when they saw Mr. Liuzza getting out of his car.

S. The jury found Mr. Thompson guilty of the murder of Mr. Liuzza, and voted to impose a death sentence. Mr. Thompson was formally sentenced to death, and his conviction and sentence were affirmed on direct appeal by the Louisiana Supreme Court.

T. In February 1989, Mr. Thompson filed a Petition for Post-Conviction Review of his convictions in the attempted armed robbery and murder cases. Between 1989 and 1999, Mr. Thompson's attorneys sought review of both of those convictions based on

arguments, among others, that the State had failed to produce to Mr. Thompson's original attorneys evidence that was favorable to the defense.

U. In early 1999, Mr. Thompson's state and federal challenges to his convictions were exhausted unsuccessfully. In April 1999, a final execution warrant was signed by Judge Patrick Quinlan, scheduling Mr. Thompson's execution for May 20, 1999.

V. In the weeks before Mr. Thompson's scheduled execution, a private investigation engaged on Mr. Thompson's behalf combed through the dormant files of the New Orleans Police Department and Crime Laboratory for evidence.

W. The investigator located a microfiche copy of a report in the files of the New Orleans Police Crime Laboratory showing that blood evidence from the pant leg of the armed robbery victim was tested at the request of the Orleans Parish District Attorney's Office.

X. As a result of the discovery of the Crime Lab Report, a hearing was held before Judge Patrick Quinlan, who vacated the attempted armed robbery conviction. After the defense presented the evidence establishing Mr. Thompson's innocence in the armed robbery case, Harry Connick filed a motion to vacate the armed robbery conviction, and Harry Connick chose not to retry him from the

armed robbery. Judge Quinlan also granted a request by Mr. Thompson for a hearing in the murder case, at which time Mr. Thompson would be given an opportunity to present evidence--including evidence newly gathered since prior proceedings and hearings--bearing on his conviction and sentencing in the murder case.

Y. Plaintiffs Exhibit 67 was first discovered by Mr. Thompson's defense team in 1999.

Z. Defendant Connick convened a grand jury in May 1999 to investigate the conduct of his own office and the former Assistant District Attorneys who were involved in the prosecution of Mr. Thompson in the armed robbery case.

AA. During the pendency of the grand jury proceedings, and before all of the witnesses were heard, Assistant District Attorney John Jerry Glas drafted indictments for two former Assistant District Attorneys, including Defendant Williams.

BB. On October 16, 2000, after extensive additional investigations by Mr. Thompson's attorneys, the trial court heard Mr. Thompson's additional post conviction relief application. At the hearing, Mr. Thompson testified for the first time regarding the murder case. Additionally, testimony was presented from Sheri Hartman Kelly, Steven McAlister and Rosemary Cash McAlister, each of whom had been interviewed by the

police as witnesses in the murder investigation.

CC. On July 17, 2002, the Fourth Circuit Court of Appeals in Louisiana reversed Mr. Thompson's murder conviction based on the deprivation of Mr. Thompson's fundamental right to testify in his own defense which arose from the concealment of the blood evidence. The Fourth Circuit did not address the other *Brady* issues presented, concluding that a ruling in favor of Mr. Thompson on the right to testify issue rendered the *Brady*-related issues moot. The State appealed that ruling to the Louisiana Supreme Court, which affirmed the decision below, thus entitling Mr. Thompson to a new trial in the murder case.

DD. District Attorney Eddie Jordan, Jr. took office on January 13, 2003.

EE. Mr. Thompson's new murder trial commenced on May 6, 2003 and continued until May 8, 2003.

FF. On May 8, 2003, a jury found Mr. Thompson not guilty for the murder of Raymond T. Liuzza, Jr. The jury deliberated for approximately 35 minutes.

GG. On May 9, 2003, after serving more than eighteen years of imprisonment, Mr. Thompson was released from prison.

HH. The following exhibits were not provided by the State to Mr. Thompson or his lawyers in the 1985 criminal prosecutions against Mr. Thompson:[1]

Exhibit 4:	New Orleans Police Daily Report No. 4662
Exhibit 5:	New Orleans Police Daily Report No. 4700
Exhibit 17:	New Orleans Police Department Evidence Property Card
Exhibit 22:	Crime Scene Technician Report – Armed Robbery Case
Exhibit 23:	New Orleans Police Daily Report No. 5066
Exhibit 25:	Photograph of John Thompson
Exhibit 26:	Mug Shot of Kevin Freeman
Exhibit 30:	New Orleans Police Department Supplemental Incident Report by Detective Donald Curole
Exhibit 31:	Office of the Orleans Parish District Attorney Screening Action Form
Exhibit 32:	Letter from Bruce Whittaker to Jay LaGarde Regarding Armed Robbery Line-up
Exhibit 33:	Screening Action Form Prepared by Bruce Whittaker

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[1] The said stipulation is not a waiver of Defendants' right to object to the admissibility of the referenced exhibits or whether is constitutes *Brady* material.

Exhibit 45: Police Department of New Orleans - Report of the Crime Laboratory

Exhibit 96: Reward Notice Regarding the Murder and Armed Robbery of Ray T. Liuzza Case

Exhibit 97: Crimestoppers Press Release Regarding the Rewards Established in the Liuzza Case

Exhibit 98: Crimestoppers Questionnaire No. 292

Exhibit 103: Audiotapes of Meetings with Perkins at the International Hotel

II. The State did not provide Mr. Thompson with information that Sheri Hartman, Rosemary Cash and Steve McAlister saw and/or heard events in connection with the Liuzza murder.

JJ. The following exhibits were not produced to Mr. Thompson or his lawyers until after his 1985 armed robbery and murder trials had been completed:[2]

Exhibit 22: Crime Scene Technician Report - Armed Robbery Case

Exhibit 30: New Orleans Police Department Supplemental Incident

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[2] The said stipulation is not a waiver of Defendants' right to object to the admissibility of the referenced exhibits or whether is constitutes *Brady* material.

Report by Detective Donald Curole

Exhibit 103: Audiotapes of Meetings with Perkins at the International Hotel

KK. The following exhibits were not produced to Mr. Thompson or his lawyers until 1999, after Mr. Thompson's defense team located Exhibit 45 (Police Department of New Orleans – Report of the Crime Laboratory):[3]

Exhibit 4: New Orleans Police Daily Report No. 4662

Exhibit 5: New Orleans Police Daily Report No. 4700

Exhibit 17: New Orleans Police Department Evidence Property Card

Exhibit 23: New Orleans Police Daily Report No. 5066

Exhibit 26: Mug Shot of Kevin Freeman

Exhibit 31: Office of the Orleans Parish District Attorney Screening Action Form

Exhibit 32: Letter from Bruce Whittaker to Jay LaGarde Regarding Armed Robbery Line-up

Exhibit 33: Screening Action Form Prepared by Bruce Whittaker

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[3] The said stipulation is not a waiver of Defendants' right to object to the admissibility of the referenced exhibits or whether is constitutes *Brady* material.

Exhibit 96: Reward Notice Regarding the Murder and Armed Robbery of Ray T. Liuzza

Exhibit 97: Crimestoppers Press Release Regarding the Rewards Established in the Liuzza Case

Exhibit 98: Crimestoppers Questionnaire No. 292

LL. The following exhibits were offered into evidence during the 1999 proceedings that resulted in the dismissal of the 1985 armed robbery charges against Mr. Thompson:[4]

Exhibit 17: New Orleans Police Department Evidence Property Card

Exhibit 22: Crime Scene Technician Report – Armed Robbery Case

Exhibit 29: Photograph of Thompson Published in THE NEW ORLEANS TIMES-PICAYUNE

Exhibit 31: Office of the Orleans Parish District Attorney Screening Action Form

Exhibit 32: Letter from Bruce Whittaker to Jay LaGarde Regarding Armed Robbery Line-up

Exhibit 33: Screening Action Form Prepared by Bruce Whittaker

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[4] The said stipulation is not a waiver of Defendants' right to object to the admissibility of the referenced exhibits or whether is constitutes *Brady* material.

Exhibit 45: Police Department of New Orleans – Report of the Crime Laboratory

Exhibit 58: Affidavit of Michael J. Riehlmann

Exhibit 62: Report of Crime Laboratory Analyzing Thompson's Blood Type

MM. The following exhibits were used by Mr. Thompson during the May 2003 murder retrial of Mr. Thompson:[5]

Exhibit 4: New Orleans Police Daily Report No. 4662

Exhibit 5: New Orleans Police Daily Report No. 4700

Exhibit 7: Mug Shot of John Thompson

Exhibit 23: New Orleans Police Daily Report No. 5066

Exhibit 24: Richard Perkins' Statement to the Police (Homicide Division)

Exhibit 25: Photograph of John Thompson

Exhibit 26: Mug Shot of Kevin Freeman

Exhibit 27: Kevin Freeman's Statement to the Police (Homicide Division)

Exhibit 30: New Orleans Police Department Supplemental Incident Report by Detective Donald Curole

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[5] The said stipulation is not a waiver of Defendants' right to object to the admissibility of the referenced exhibits or whether is constitutes *Brady* material.

Exhibit 96: Reward Notice Regarding the Murder and Armed Robbery of Ray T. Liuzza

Exhibit 97: Crimestoppers Press Release Regarding the Rewards Established in the Liuzza Case

Exhibit 98: Crimestoppers Questionnaire No. 292

Exhibit 103: Audiotapes of Meetings with Perkins at the International Hotel

NN. High-ranking and experienced Assistant District Attorneys, including Defendants Dubelier and Williams, were not required to participate in a pretrial conference with the Chief of Trials.

OO. On February 24, 1997, Thompson brought a Habeas Corpus action involving eleven principal claims before the United States District Court, Eastern District of Louisiana. *Thompson v. Cain,* 1997 WL 79295 (E.D.La). The Eastern District of Louisiana "conducted an exhaustive review of the pleadings, exhibits and the record of the proceedings that took place in the state courts" and determined that Thompson was not entitled to an evidentiary hearing and denied the application for habeas corpus relief. This decision was reviewed on Oct. 27, 1998 by the United States Fifth Circuit Court of Appeals, *Thompson v. Cain,* 161 F.3d 802 (5th Cir. 1998), which affirmed the judgment of the Eastern District.

PP. On June 29, 1999 the trial court granted Thompson a new trial in the armed robbery case, however, the charges were *nolle prosequied* by the Orleans Parish District Attorney's Office.

QQ. When John Thompson was prosecuted in 1985, *Brady* had been in existence for 22 years.

RR. in 1985, DR 7-103 of the Code of Professional Responsibility provided that public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

SS. Harry Connick filed a complaint against Michael Riehlmann for not disclosing or reporting the actions of Gerry Deegan. Mr. Connick also filed an ethics charge against James Williams for his actions in the *Thompson* case.

TT. Defendants have not provided or identified any written policy promulgated by the District Attorney's Office concerning Brady that pre-dates a February 1987 policy manual, other than the Code of Professional Responsibility which concerned Brady and which had been in existence since 1970.

UU. None of the district attorney witnesses recalled any specific training session concerning Brady prior to or at the time of the 1985 prosecutions of Mr. Thompson.

VV. All of the conduct alleged by Plaintiff concern Defendant Connick arose in the course of Connick's official duties and in his official capacity as the Orleans Parish District Attorney.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[caption omitted in printing]

MONDAY, FEBRUARY 5, 2007, 1:45 P.M.
VOLUME I
TRANSCRIPT OF TRIAL PROCEEDINGS
HEARD BEFORE THE
HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

* * *

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* * *

[p.54] witness?

MR. BANKS: Mr. Williams, Your Honor, James Williams.

THE COURT: Okay.

MR. BANKS: I'm just going to turn this podium, if I may.

THE COURT: Yes. I'm just going to ask the jury. Do you need a break of 10 or 15 minutes first or do you want to keep going? Everybody okay?

THE DEPUTY CLERK: Please raise your right hand.

JAMES WILLIAMS,

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE DEPUTY CLERK: Please be seated. Please speak directly into the microphone, state your name for the record.

THE WITNESS: James Williams.

MR. BANKS: Your Honor, I've prepared just a smaller notebook of some of the exhibits that we would likely use with Mr. Williams. May I hand it to the witness?

THE COURT: Sure.

MR. AARON: Your Honor, can we get a copy of what he's handing to the witness?

MR. BANKS: They are all marked exhibits, Your Honor, everybody has the bigger volumes. I just thought it would be easier with the witness. I can show you which ones they are.

[p.55] MR. AARON: It would be easier instead of looking through a big stack.

THE COURT: Do you have an extra book like that that you can give to Mr. Aaron?

MR. BANKS: He can use mine, Your Honor.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. BANKS:

Q. Good afternoon, Mr. Williams.

A. Good afternoon.

Q. You're a lawyer, sir?

A. I am.

Q. How long have you been a member of the Bar?

A. Since February of 1978.

Q. So about 28 years? 29 years?

A. Almost 29.

Q. When were you hired by the Orleans Parish District Attorney's Office?

A. In August of 1980.

Q. Was that your first experience in the area of criminal law?

A. Yes.

Q. You had never worked in a prosecutor's office before that?

A. I clerked when I was in law school at LSU at the East Baton Rouge Parish District Attorney's Office.

Q. But from the time you graduated law school and became a [p.56] lawyer, the Orleans Parish District Attorney's Office was your first job in the field of criminal law?

A. Yes, sir.

Q. How long did you work there?

A. Ten years.

Q. So from 1980 to 1990, correct?

A. Yes, sir.

Q. And am I right that you were one of the prosecutors in both the carjacking trial of Mr. Thompson in April of 1985 and the murder trial of Mr. Thompson a little less than a month later?

A. Yes, sir.

Q. You were the lead prosecutor in the carjacking case?

A. Yes.

Q. And in the murder case, you were the second behind Eric Dubelier; is that right?

A. That's correct.

Q. When you started --

THE COURT: Excuse me. Mr. Williams, pull that microphone a little closer to you, please. Thank you.

EXAMINATION

BY MR. BANKS:

Q. When you started in the District Attorney's Office in 1980 as a brand-new prosecutor, they didn't give you training on criminal law and procedure, did they?

A. Yes. That's not true. I received training on a daily [p.57] basis.

MR. BANKS: May I show Mr. Williams his deposition transcript, Your Honor?

I'm going to put in front of him -- does the Court wish a copy of the deposition transcript?

THE COURT: No, just give it to the witness page and line.

MR. BANKS: I'm going to put in front of him volume one and volume two. And, Your Honor, I would like to direct Mr. Williams to page 25 of his deposition transcript from the first day. And I'm going to ask to

show the jury Mr. Williams' testimony on this point from the first day of his deposition?

THE COURT: Let's let him read it first.

EXAMINATION

BY MR. BANKS:

Q. Page 25, lines 14 to 20. Why don't you take a look at that, Mr. Williams.

A. (Witness reviews the document.)

Okay.

Q. Mr. Williams, you do recall that I took your deposition, that is, I asked you some questions under oath earlier in this case when a jury was not present?

A. Correct.

MR. BANKS: May we show the jury, Your Honor, what Mr. Williams said at his deposition?

[p.58] THE COURT: Sure.

(WHEREUPON, the videotaped deposition of James Williams was played as follows:)

EXAMINATION

BY MR. BANKS:

Q. As a new assistant district, when you arrived at the office, did they have any kind of orientation for you?

A. No.

Q. Did they give you any training on criminal law and procedure?

A. No.

(WHEREUPON, the videotape was stopped.)

EXAMINATION

BY MR. BANKS:

Q. So, no was the answer at your deposition as to whether they gave you training on criminal law and procedure; is that correct, sir?

A. That is correct, and I believe your question to me was did I receive any training. I did receive training at that office on what my job was in the magistrate court.

Q. But not on criminal law and procedure?

A. I don't recall there being specifically any training on criminal law and procedure, no, sir.

Q. The district attorney, the top guy in the office at that time was Harry Connick, correct?

[p.59] A. He was.

Q. He was the DA, the top DA during the entire time you were in the Orleans Parish District Attorney's Office, right?

A. That's correct.

Q. And he made policies for the office as the district attorney?

A. Yes, sir.

Q. Sometimes he talked about those policies at meetings he held with assistant district attorneys such as yourself?

A. Yes, sir.

Q. Did he hold these meetings often, sir?

A. I don't recall.

Q. Would you say at these meetings that he held with assistant district attorneys he was acting primarily as a cheerleader giving a go-get-them type talks and the fire and brimstone?

A. Sometimes.

Q. The training that you got or any training that you got was really through doing things, from working as a prosecutor and trying cases, right?

A. That's part of it, yes, sir.

Q. Was it a hard job being a prosecutor?

A. A very hard job.

Q. A lot of work to do?

A. Yes.

Q. When you had cases like the Thompson case, that was a big [p.60] case, right?

A. It was a capital murder case.

Q. So you worked hard on that, you did your homework?

A. Yes.

Q. Homework that you did meant looking through the files?

A. Yes.

Q. For example, you would get files from the police that you would look through to learn the facts that they uncovered in the course of their investigation?

A. Are you talking about the Thompson case?

Q. Yeah, let's talk about the Thompson case. Is that right?

A. I would have reviewed with Mr. Dubelier the facts of the case and the police reports.

Q. You'd certainly want to know those backwards and forwards before you go to trial, right?

A. Yes.

Q. I mean, for example, in those files you got from the police, in those police reports were summaries of what witnesses told the police, right?

A. Yes.

Q. References to the physical evidence?

A. Yes.

Q. Actual witness statements signed by people who would be testifying on the witness stand at trial?

A. Yes.

[p.61] Q. You would review crime scene technician information, documents prepared by people from the police department who took physical evidence?

A. I will answer yes, but subject to I do not recollect what reports that I reviewed specifically in that particular case.

Q. Would you say you worked with the police from time to time?

A. Absolutely.

Q. It was a cooperative endeavor between you and the police department?

A. Yes, sir.

Q. Early in the case, once a case went to the District Attorney's Office, am I right that police files would usually be delivered to the District Attorney's Office?

A. That's correct.

Q. And from that point forward, they were all available to you, whatever the police had, you could see?

A. Whatever the police delivered to me, I had available.

Q. But if you wanted to go over to the police office and see if there was anything else that they hadn't delivered in a big case like the Thompson case, you could do that?

A. Yes, absolutely.

Q. No one from the police ever said, No, Mr. Williams, or any assistant district attorney, you are not allowed to look in our files?

A. That's true.

[p.62] Q. That's because you worked together in the job of prosecuting people?

A. Yes, sir.

Q. And what they had was helpful to you in your efforts to get convictions in those cases, right?

A. They were helpful in determining whether or not to even take a case.

Q. But those files that you got from the police department, the files that contained descriptions of, given by witnesses and physical evidence, those weren't just turned over to the defense, were they?

A. No, sir.

Q. For example, things like witness statements, things that witnesses told to the police that were written up and the witnesses signed, those were not typically turned over, were they?

A. That's correct.

Q. And police reports, things like police reports that would show the history of the police investigation from the time the police started looking at the crime, up through the time of the arrest, those reports could be quite lengthy, right?

A. Yes.

Q. In a case like the Liuzza case, for example, a supplemental police report could be 25, 30, 35 pages of single-spaced typed information?

[p.63] A. Could be.

Q. And would have a lot of facts, things they learned that didn't go anywhere or things that might lead them to a suspect?

A. That's correct.

Q. But those kind of things typically were not turned over to the defense by the Orleans Parish District Attorney's Office, were they?

A. In 1985, that's correct.

Q. And that was because of the policy set at the top of the office by Mr. Connick as the district attorney, right?

A. That's correct.

Q. When you had those kinds of things, though, when the police took police reports and they brought them over to the District Attorney's Office, you found those things helpful in your preparation for trial?

A. Yes, sir.

Q. Same thing with the witness statements, you wouldn't just put a witness on the stand without reading his statement. You would want to know what that witness said when he or she was interviewed by the police?

A. Mr. Banks, are we talking about the Liuzza case or in general, because --

Q. Let's say generally?

A. Would you ask the question again.

Q. Yes. Generally, when you got witness statements, statements [p.64] signed by witnesses that the police delivered to you, you would want to read them so you could know what that witness told the police before the witness took the stand?

A. I would want to read that report before I had the witness come in and be interviewed by me. Way before the case was accepted.

Q. And then you would look at them again in preparing for the trial because the trial might be months later, right?

A. If the case was accepted, yes, sir, absolutely.

Q. In a case like the Thompson case, where the arrest was made in January and referred to the District Attorney's Office and the trial didn't happen until May, you would certainly want to look at the witness statements again before you put the witnesses on the stand at trial, right?

A. Certainly.

Q. Those witness statements also, though, those weren't turned over to the defense in 1985?

A. Are you speaking in the Liuzza case?

Q. Let's start with the Liuzza case.

A. I don't have a recollection of which statements were turned over or not in the Liuzza murder case.

Q. In the ordinary course, though, generally, witness statements obtained by the police were not turned over to the defense around at that time, were they?

A. Generally, no, they were not.

[p.65] Q. And that, too, just like the police reports, that was because of a policy set at the top by Mr. Connick, right?

A. That's correct.

Q. Do you recall the police preparing what we've referred to sometimes in this case as daily reports?

A. Yes, sir.

Q. What are daily reports?

A. Daily reports are piecemeal accounts of investigations in particular cases.

Q. So unlike a supplemental police report which might be, say, a 20- or 30- or 40-page piece that was typed up at the end of a police investigation, the daily reports are kept by them each day, right?

A. I don't know if it's on an actual 7-day-a-week basis, but those are what they call dailies because they were generally a small part of the entire case.

Q. But if we take something like the Liuzza murder, for example, that was a widely publicized crime in New Orleans, right?

A. It was.

Q. Front page of the newspaper?

A. It was.

Q. There was a reward posted?

A. Yes, there was.

Q. In a crime like that, you would expect the police to be [p.66] producing daily reports showing the progress

of their investigation, maybe not every day but day by day?

A. I think daily reports were generated in every single homicide case.

Q. Because the investigation of a homicide case is very important, right?

A. Yes.

Q. The thoroughness is very important?

A. Yes.

Q. And to the extent the police are going out and collecting real facts, the daily reports are a good place to look to see what kinds of facts the police are collecting, right?

A. Yes, sir.

Q. And you as a prosecutor, if you were getting ready for trial, let's say when you were getting ready for trial in Mr. Thompson's case, when Mr. Thompson was charged with murder, you certainly would have looked at the police daily reports?

A. I don't have a recollection of whether I did that or not.

Q. Generally speaking, would you say you looked at the police daily reports before trying a significant case such as a homicide case?

A. More than likely, yes.

Q. And if you didn't have a supplemental police report yet, then you would certainly be more likely to look at the daily reports, right?

[p.67] A. Generally, the daily reports were just an account of the information that had been developed. A lot of the dailies were just a matter of we went to, knocked on this door, you know, nobody had any information, knocked on this door, it was just the work that was being done up until the police presented us with a supplemental report.

Q. Let me ask generally about the policies of the office then. In 1985, the daily reports, like witness statements, and like the bigger police reports, those typically were not turned over to the defense in 1985, correct?

A. That's correct.

Q. And again, that was because of a policy set by Mr. Connick as the district attorney, the top guy in the office?

A. That's correct.

Q. I would like to talk a little bit about the two prosecutions of Mr. Thompson and how they related to each other. Would you agree with me that the armed robbery prosecution of Mr. Thompson was used as part of the murder case?

A. Yes.

Q. That prosecution, the two prosecutions --

A. Let me say that it was our intention, if the jury returned a guilty verdict, guilty as charged, that we would attempt to use that conviction in the penalty phase to show the defendant's character and propensity.

Q. But the carjacking case was treated as part of a homicide [p.68] case, wasn't it?

A. No.

Q. Would you turn to your deposition at page 48. I would like you to look at line 9 for a moment. Tell me when you are there.

Are you there, sir?

A. Yes.

Q. I would like you to look from line 9 to page 49, line 14, and then I'm going to ask my friend here, Mr. Vincent, to play that video clip for the jury as well. Tell me when you've looked through it.

A. How far on page 49?

Q. Through line 14.

A. Okay.

MR. BANKS: Mr. Vincent, can we show Mr. Williams his testimony there.

(WHEREUPON, the videotaped deposition of James Williams was played as follows:)

EXAMINATION

BY MR. BANKS:

Q. How about the carjacking? Was that one of his cases?

A. That was part of the homicide case.

Q. The carjacking was part of the homicide?

A. Yes.

Q. Why do you say that?

A. Because it followed -- there's a second charge. In other

* * *

[p.72] Judge Quinlan at the close of the hearing, something like, We may want to test the defendant or take blood from the defendant?

A. I think I said we planned to do that.

Q. But you didn't do it?

A. I did not.

Q. So you don't know what signal the defense lawyer for Mr. Thompson took from that because you never went forward and got his blood?

A. Mr. Banks, if I can explain, first off, to digress a little bit, at that point in time, I was not the special

prosecutor on the Thompson murder case. I was asked by Mr. Dubelier to handle a Motion to Suppress the identification hearing on an attempted armed robbery.

Mr. Dubelier was unavailable for one reason or another. I think actually it was because he was about to get married. So I told him I would be happy to handle that motion. It was a Motion to Suppress. I had probably done hundreds of them before that. The issue was whether or not any of the police officers had suggested to one of the LaGarde children who to pick out. I think we had one or two witnesses.

At that point in time, on the screening action form, which was on the front page of our file, Bruce Whittaker had written, You may want to take the blood type of John Thompson. Having read that in open court at the conclusion of the motion hearing, I announced to the court what Mr. Whittaker had advised [p.73] we needed to do. Let's take the blood of John Thompson.

Q. But you never did?

A. No. You didn't let me finish, sir. When I finished doing that, Mr. Bertel was there in open court. He heard that. Now, what happened after that, I have no idea, because I turned the file back over to Mr. Dubelier.

Q. Mr. Williams, would it be a slightly more accurate version of what you said before to this jury if we changed it as follows, if we changed it to say, I wanted the jury to know everything it could about John Thompson except his blood type and except that there

was blood evidence in the carjacking case, would that be a more accurate way to put it, sir?

MR. CARVER: Objection, Your Honor, argumentative.

THE COURT: Overruled.

THE WITNESS: That's not true.

EXAMINATION

BY MR. BANKS:

Q. Mr. Williams, you knew in 1985 there was blood evidence, didn't you?

A. Yes.

Q. You knew that before the carjacking trial?

A. I reading what was on the screening action form. I surmised that Bruce Whittaker had knowledge that there could possibly be blood evidence.

MR. BANKS: Let's take a look at the screening action [p.74] form. Would you put Exhibit 33 up, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. It's in your book, if you wish to see it, but you'll also see it on the screen here if that's easier for you, Mr. Williams.

This is Exhibit 33. This is a screening action form, isn't it?

A. Yes.

Q. Okay. And a screening action form, let's just explain what that is. There is a person, a district attorney who is assigned to a case when it is comes over from the police department, and that's called a screener?

A. Correct.

Q. Mr. Dubelier, the lead prosecutor on the Thompson case, he was the chief of screening at the time, right?

A. He was.

Q. And tell us how the screening process works when the file comes over from the police department to the screener?

A. Well, that's not quite the way that it works. The initiation of the screening process begins when there is an arrest made by the NOPD. At that point in time, generally, a screener is assigned to the case. There were several different departments in the screening division. Mr. Dubelier was the chief of screening. There was a narcotics screener that was, who had handled, pardon me, narcotics cases. At that time, I was the [p.75] homicide screener. I handled homicides. I think Mr. Whittaker handled armed robberies. There was also a sex crime screener and there were several general screeners.

This screener --

Q. I'm sorry --

A. You asked me to --

Q. Please.

A. When a police report would come over, it would be affixed to the screening action form. Information would be entered on there. Generally there was an investigator in the screening division who handled that aspect of the job. At the point in time when we received a police report, whether we were a general screener or a specialty screener, we would review what's in the police report.

And at that point in time, if we felt like we needed more information or we wanted to interview witnesses, generally witnesses were interviewed. We tried to get as much information as we could, which, on occasion, attorneys would call us and say, I represent someone and I have information that I would like to bring to your attention. So basically, the screening was the first stop for an arrest for review by the District Attorney's Office.

Q. You wanted to get as much information as you could, right?

A. Yes.

Q. That's what you just said?

[p.76] A. That's correct.

Q. You didn't want to turn as much as you could over to the defense, you just wanted to get it so you could use it.

A. At this point in time, Mr. Banks, no charges had been accepted. As a matter of fact, to answer your question, I can tell you, and I believe I told you this before, that on many, many occasions, when I was the homicide screener, and also when I was the armed robbery screener before that, if I had something in a report that didn't sit right, I often called the, if someone didn't have an attorney, I would call Mr. Bertel's office and advise him, Look, would you go talk to this person who apparently doesn't have a lawyer, because I have some unanswered questions that perhaps you can help me with. I did that all the time.

Q. But not with this report?

A. Well, this report was screened by Mr. Whittaker.

Q. But you got it. You saw it, right?

A. I did see it.

Q. You didn't call up Mr. Bertel and say, Hey, I've got this report. You might want to take a look at it, did you?

A. I advised the court, in open court, with Mr. Bertel standing three feet away from me that we, we wanted to draw blood from John Thompson.

Q. Did you call Mr. Bertel and tell him he might want to take a look at this report, the way you said you did sometimes with other information?

[p.77] A. I did not.

Q. Let's look at some pieces of this report.

MR. BANKS: Mr. Vincent, can you blow up some pieces on the top and bottom.

EXAMINATION

BY MR. BANKS:

Q. This shows, this is the top of the screening action form and you see that Mr. Thompson's name is up there. Do you see where it says, John Thompson?

A. Yes.

Q. And beneath that, there is a name, Whittaker. Who is that?

A. Bruce Whittaker.

Q. Bruce Whittaker was the screener on this case, right?

A. Bruce Whittaker screened armed robberies and arsons.

Q. So that means in Mr. Thompson's armed robbery case, Bruce Whittaker got a file from the police department, would have reviewed it and then would have written up this screening action form?

A. Yes, sir.

Q. Let's go down to the bottom, please. So this refers to some of the physical evidence that Mr. Whittaker read about in the file, right?

A. Yes, sir.

Q. First it says, "The gun was the same make and model as the Liuzza weapon." Right?

[p.78] A. Yes.

Q. Now, again, this would have been some time after Mr. Thompson was arrested and charged with murder, right?

A. There is a date on there. I'm sure that the date screened --

Q. The date at the top, 2/25/85, it says date screened?

A. That's correct.

Q. Okay. So this was after Mr. Thompson was already under arrest?

A. For the murder, yes, sir.

Q. In fact, this was about two months after the carjacking occurred, if, as I told you the carjacking occurred on December 28th, right?

A. Yes, sir.

Q. Now, let's go to the bottom. "Victim made photo ID. Will be in town 3/11/85 if physical desired. May wish to do blood test."

That's what clued you in at that point that there may be a need to take blood, and that's what caused you to make a comment at the March 11th hearing?

A. Yes, sir.

Q. In addition to this form, Mr. Williams, did you also see something known as the crime scene technician's report?

A. I don't recall.

MR. BANKS: Let's put up the crime scene technician's [p.79] report. It's Exhibit 22. Put up page 1 of that first.

EXAMINATION

BY MR. BANKS:

Q. Now, let me just ask you, have you seen reports like this before?

A. Yes, sir.

Q. The crime scene technician, is that the person who goes to the scene of the crime and takes physical evidence?

A. Yes.

Q. So if there are gunshots, the crime scene technician may take casings or slugs from a wall or, God forbid, a body or whatever it is, right?

A. Yes.

Q. He could dust for fingerprints?

A. Yes, sir.

Q. He could take blood evidence?

A. Yes, sir.

Q. He could take photographs?

A. Yes, sir.

Q. That's what a crime scene technician does?

A. Yes, sir, that's correct.

Q. And that person is often a witness at a trial of a case. A crime scene technician might come in and testify at a trial?

A. That's right.

Q. And you might put a person on when you were an assistant [p.80] district attorney and say, Tell us what evidence you've got?

A. Yes.

Q. Now, this crime scene technician report, you can tell says, "Victim, Stewart LaGarde," about four lines down. Do you see that?

I know it's hard to read. It's also in your book if that's easier.

A. I see it.

Q. So this is the carjacking case that Mr. Thompson was charged with?

A. Yes. It appears to be.

MR. BANKS: Now, let's go to page 4 of this document, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. I know this is very hard to read, so I'm just going to read it to you. It's in your book, too, and if it sounds like it's hard to follow or if you need to correct me, you can.

A. What page?

Q. It's Exhibit 22, page 4. It may be easier to see on the screen than in the book, sir.

But it looks to me like the first entry says, "One tennis shoe, white, left side, make FootJoy," that's what Mr. Aaron told us, that it was a FootJoy shoe?

A. Yes.

[p.81] Q. "With blood collected from victim on scene."

And the second one seems to say, "One piece of victim's right pant leg with blood collected from victim on scene?"

A. Yes, sir.

Q. Anyone reviewing this report would understand that the crime scene technician went to Stewart LaGarde and cut a swatch out of his pants that had some blood on it?

A. Yes, sir.

Q. Now, you would expect if the person, the crime scene technician, could cut the pant leg off with blood, the crime scene technician must have at least suspected that that blood could have come from the perpetrator?

A. It was evidence at the scene of a crime.

Q. There would be no evidence reason to cut up Mr. LaGarde's pants and take a swatch back to the evidence room if, in fact, it was Mr. LaGarde's blood, right?

A. I couldn't speak to that.

Q. With that swatch, that bloody swatch of pant leg, the crime scene technician had collected something that was potentially a very valuable piece of evidence, right?

A. That's correct.

Q. Because that could be tested?

A. Possibly.

Q. They didn't do DNA testing back then?

A. Back then they did not, no.

[p.82] Q. But you could test that bloody swatch and try to see if it's type B or O or A or AB; that was around?

A. That's correct.

Q. And that was a very easy test to do?

A. I don't know about that. I wasn't involved in that. But I know it was a test that was done.

Q. As a prosecutor who is involved in prosecuting people charged with violent crimes, this wasn't the first time that blood evidence was tested for blood type in your experience?

A. No, sir.

Q. You knew that was something the police crime lab could do?

A. Yes.

Q. And you would have known that if that bloody swatch of pant leg had a blood type that did not match Jay LaGarde and did not match John Thompson, that might be very helpful in proving Mr. Thompson's innocence?

A. Yes.

Q. On the other hand, if the bloody swatch had a blood type that matched Mr. Thompson, that might be evidence you could use in your case trying to get a conviction?

A. Yes, sir.

Q. And you could have used that to get that conviction and then use it at the penalty phase of the murder case?

A. Yes, sir.

Q. Without that blood evidence, the evidence against [p.83] Mr. Thompson in the carjacking case was witness identification, right?

A. Yes.

Q. In your experience as both a prosecutor, and now you're a defense lawyer, right?

A. That's correct.

Q. Witness identifications sometimes get challenged, right?

A. In almost every instance.

Q. Every instance, sometimes they are right, sometimes they are not?

A. Right.

Q. In fact, months after the fact, witnesses sometimes give descriptions of perpetrators that don't even match what they said the day after the crime, right?

A. Sometimes.

Q. And a defense lawyer works hard to challenge convictions based solely on witness identification?

A. I work hard as a criminal defense lawyer to challenge state's evidence in every case.

Q. In the LaGarde carjacking case, there were three children in the car when someone jumped in late at night outside the Superdome, right?

A. Yes.

Q. It's a tough identification: Late at night, in a car, during a struggle.

[p.84] MR. CARVER: I object, argumentative.

THE COURT: Overruled.

THE WITNESS: It could have been. I don't recall the lighting conditions, but I can say that the perpetrator was within a few inches, the face was within a few, this wasn't a case where somebody was walking down the street or a distance away. In this case, he was very close.

EXAMINATION

BY MR. BANKS:

Q. But certainly the blood evidence, if it matched Mr. Thompson, would have been helpful to add to that witness identification?

A. Yes, sir, that's correct.

Q. So it was either going to make a conviction more likely, which was good for the prosecutors, or possibly prove Mr. Thompson's innocence?

A. It might have.

Q. That blood evidence was tested, wasn't it? There was a crime lab report showing that the blood evidence was tested?

A. That's correct.

Q. Even if you as a prosecutor did not know Mr. Thompson's blood type, did not know that he was type A, would you agree with me that you were under an obligation to turn over that blood evidence and the report showing the testing of the blood evidence, if you had known about it?

[p.85] A. If I had been the lead prosecutor on this case, I was not, Mr. Dubelier was, I would have done exactly what Mr. Dubelier did. Discovery was filed by the defense seeking production of an examination of any exhibits, any scientific samples that we had.

My recollection is that Mr. Dubelier answered that question, Will be allowed at defendant's convenience or however he answered. My answer, had I been in Mr. Dubelier's position, I would have done the same thing.

Q. Meaning sit on it and not show it to the defense?

A. No, I answered discovery that any exhibits that we had would be available to the defense.

Q. To your knowledge, did Mr. Dubelier ever show it to the defense? I'm not asking what he wrote on a piece of paper. Did he ever go to Mr. Thompson's lawyer and say, Here it is?

A. I don't know.

Q. Did you?

A. I did not.

Q. So you did the same thing you think Mr. Dubelier would have done?

A. Well, you have to understand, Mr. Banks, at that point in time, Mr. Dubelier was my supervisor. He was handling both the homicide case, and I'm not trying to put off on him, I'm just explaining to you the way things worked with him. Those were his cases. At that point in time that I received that case, I was there to do the motion hearing, which I did. I didn't receive [p.86] that case until literally the few days before the trial.

Q. Mr. Dubelier was pretty high up in the office, wasn't he?

A. Mr. Dubelier at that time was the chief of screening.

Q. And he reported to the first assistant to Mr. Connick, right?

A. Yes.

Q. And the first assistant reported to Mr. Connick?

A. Yes, sir.

Q. So the level he was at was just two down from Connick: Connick, chief of trials, then Dubelier, right?

A. I'm not certain of that. Mr. Connick would be in a better position to answer that.

Q. How many assistant district attorneys were there in the office at that time?

A. The number 63 sticks in my head at that time. Right around that time. It was, I would say between 50 and 70.

Q. So Mr. Dubelier was pretty high up in that pecking order of 63 people?

A. He was.

Q. Would you agree with me, though, that if you have evidence, if you knew at the time of the carjacking trial that the blood evidence had been tested and that a result came back showing that the blood evidence was not only tested but a positive result was received, that it was type B, that you would have to turn that over to the defense?

[p.87] A. Yes.

Q. Why? Why, sir?

A. Well, if I understand your question, if you have evidence, scientific evidence that indicates that a blood sample from a scene could not possibly have been the person who was suspected of committing that crime, that would be *Brady* material and it would absolutely need to be turned over.

Q. Suppose you have that report and that report shows type B and you don't know that Mr. Thompson is type

O. You don't know if he's type O or type B or type AB, you still have to turn that over, don't you?

A. You have to turn over any scientific evidence that you have, so I would agree, yes.

Q. Because otherwise, you might be convicting the wrong man?

A. That's possible.

Q. And that's a bad thing?

A. That is a bad thing.

Q. And if you're convicting the wrong man, if Mr. Thompson is not the carjacker and you convict him, that means the real carjacker is still out there, right?

A. Yes, that's correct.

Q. So you would have done two bad things by convicting the wrong man. One, you put a potentially innocent man in jail, actually three bad things. Two, you would use it against him in the murder case. And three, the real carjacker would still be [p.88] running around, and that's all bad, isn't it?

A. I agree with you a hundred percent.

Q. Do you recall that just a few days before the carjacking trial of Mr. Thompson that that bloody swatch that's referred to in the crime scene technician report was checked out of the evidence locker; did you know that?

A. No.

Q. Do you know now that it was checked out of the evidence locker by one of the prosecutors and taken to the crime lab?

A. Yes.

Q. The test that was done on that bloody swatch of fabric, you say that test was directed by Mr. Dubelier or Mr. Whittaker, correct?

A. I didn't direct it.

Q. You said it was directed, you know that it was directed by Mr. Dubelier or Mr. Whittaker, right?

A. Since 1999, I have come to learn to that.

Q. You learned that it was Dubelier or Whittaker, you don't know which one?

A. I'm not sure.

Q. You now know, of course, that that crime lab report did come back and it did show a definitive test of type B.

A. Yes.

Q. Let's take a look at that.

MR. BANKS: Would you put Exhibit 45 up, Mr. Vincent.

[p.89] EXAMINATION

BY MR. BANKS:

Q. There we go. This is the hard-to-read crime lab report.

MR. BANKS: I want to ask Mr. Vincent to pull out a couple of portions of it. The top part.

EXAMINATION

BY MR. BANKS:

Q. Let's start with the top part.

A. Where would that be in my book, Mr. Banks?

Q. I am sorry. It is Exhibit 45. Do you have that, Mr. Williams? Again, some of these documents are easier to read on the screen than in the book.

A. I got it.

Q. Now, whichever you look at, the book or the screen, the date of this report, April 9, 1985, that's the date the report was released by crime lab, right?

A. Yes, sir.

Q. That's two days before the carjacking trial?

A. If you tell me the carjacking trial was April 11th, okay.

Q. I'll tell you that. I actually read a stipulation that said it was April 11th and 12th.

A. All right.

Q. So for this to be going on just two days before the trial, Mr. Dubelier and Mr. Whittaker, whichever of them directed the test, must have wanted to use it for the trial, right? That's [p.90] what you would expect?

A. Yes.

Q. It says here, To -- you see where it says that on the left there, "To: District Attorney's Office."

That's where you were, right? "To District Attorney's Office."

A. I see that, right.

Q. "Attention: ADA Bruce Whittaker."

A. Yes.

Q. Mr. Whittaker was sent this report, according to what it says here?

A. Yes.

Q. And he had been the screener on the case?

A. That's correct.

Q. He was also a good friend of yours, right?

A. He was.

Q. I mean, he worked with you in the office and he socialized with you?

A. Yes.

Q. His office was just a few doors down from yours, right?

A. He was next to my office.

Q. You talked to him all the time?

A. Yes.

Q. He was also a witness at the carjacking trial?

A. Yes.

[p.91] Q. You're aware, aren't you, that Mr. Whittaker has testified that he took that report and he put it on your desk?

A. Yes.

Q. Let's look at the bottom of the report. Under results. "Stains on specimen 1 yielded positive serological reactions for Group B human blood."

Do you see that?

A. Yes.

Q. That's a fancy way of saying the bloody swatch that was tested was type B?

A. I'm not an expert in serological reactions. It's very confusing, but I would agree that Group B is B.

Q. Isn't that how you would have read it, sir? We tested this swatch and it's type B?

A. Yes.

Q. That would tell you that if this is the perpetrator and you know the perpetrator is type B, the only thing you need to know is Mr. Thompson's blood type and possibly we could rule him out completely?

A. That's correct.

Q. Did Mr. Whittaker come to you at any point after he put the report on your desk and say, Hey, Mr. Williams, or he probably would have said, Hey, Jim, what did you think of that report?

A. I don't recall him doing that.

Q. He was a witness during the trial, right? In the LaGarde [p.92] carjacking trial?

A. I don't recall. I know he showed the pictures or put together the pictures to send to one of the children in Virginia, as I recollect, but I think he testified at the motion hearing. I don't remember if he testified at the trial or not.

Q. And you know he testified at least at the motion hearing?

A. I'm pretty sure that, yes, I know that he did.

Q. If I told you that he actually showed up at the trial and testified again about the photo array he gave to the LaGarde children, would you have any reason to disagree with that?

A. Certainly not.

Q. Do you think you would have talked to him before the trial about his testimony?

A. I remember talking to him about his testimony during the motion hearing.

Q. Do you think he would have brought up anything about the report that he remembers putting on your desk?

A. If he did, I don't recollect it.

Q. You would agree with me, though, that this crime lab report dated April 9, 1985, did not do anything to cause you or the attorney who was assisting you in this case, Mr. Deegan, to say anything to Mr. Thompson's lawyer at the trial about the blood evidence?

A. Mr. Banks, I don't recall ever seeing that report until 1999.

[p.93] Q. At any time, though, prior to the armed robbery trial, did you tell Mr. Bertel, Mr. Thompson's lawyer, that there was blood evidence, that the evidence had been tested, that a blood type had been determined definitively from the swatch and that the blood was that of the perpetrator?

A. I couldn't have told him that because I never saw the report.

Q. So you didn't even know it?

A. I did not know about that report until sometime in 1999.

Q. Mr. Williams, you said this carjacking case was important in the murder case, right?

A. Yes.

Q. And a carjacking of three teenagers is a big thing, right?

A. Yes.

Q. And you worked hard to prepare for your cases to get convictions?

A. Yes.

Q. So what were you, just proceeding in some sort of blissful ignorance about the blood evidence? It was just going to be out there but you didn't care where it was?

A. I did not follow up on that. My recollection, again, we're talking 22 years ago, okay, and I don't remember much about this case. I have previously told you what I remember about the case. I remember we had three positive identifications. The decision was made, you know, to prosecute this case.

[p.94] We were, you know, we had interviewed those children. They were very good witnesses. And that's the way the case was tried.

And also, I got this case very late in the day before trial, so to speak. And I went with what we had.

Q. So you didn't have time to do your customary thorough preparation?

A. I went with what we had.

Q. Late in the day, like a day before the trial, two days before the trial?

A. Well, the trial was on a Monday. I spoke to Eric about the case probably, he said I, would you handle the case for me? I can't do it for one reason or another, and I agreed to do that.

Q. He didn't say anything like, We have this really big carjacking case, and we need it to set up a death penalty in the murder case, so just go in and wing it. You don't need to prepare at all?

A. Mr. Banks, every single case that I took to a jury when I was an assistant DA was a big case to me.

Q. At least in the moments, the hours, the day before the carjacking trial, you would have looked at the file?

A. Certainly.

Q. You would have known the screener was Bruce Whittaker?

A. Certainly.

Q. So you could have walked, you said it was just a couple [p.95] doors down to Mr. Whittaker's office and said, Hey, Bruce, there is something in here about blood evidence. What's going with that? Did you do that?

A. I don't recall doing that.

Q. Do you think maybe you did and you just forgot?

A. That could be.

Q. But you certainly knew there was blood evidence; anyone knew that from the file?

A. I was the one who announced in open court that blood was going to be an issue in this case.

Q. Well, let's talk about open court, Mr. Williams. Would you agree with me you did everything you could during that carjacking trial to stay away from the topic of blood evidence because Mr. Thompson and his lawyer couldn't know there was blood evidence?

A. Well, Mr. Banks, as I've told you before, my best recollection, and I have absolutely nothing to base that on other than having worked in that office, having dealt with those lawyers, Mr. Bertel on literally a daily basis, that the fact that Mr. Bertel did not follow up on this, to me indicated to me and I may have discussed this with the other lawyers, that Thompson admitted to him that he did the crime.

I cannot fathom how it is that when it's announced in open court that there is blood evidence that may be relevant that a defense lawyer, because that's what I do now, wouldn't have [p.96] followed up on it.

Q. You didn't say there was blood evidence, sir. You told us what you said in court on March 11th was, We may need to take blood, and then you never took it; is that right?

A. I stand by my answer.

Q. You gave the opening statement in the carjacking case. You stood up just like Mr. Cooney did in this trial, Mr. Aaron did on this trial, and you outlined what you intended to prove?

A. The record reflects that.

Q. And in that opening statement, you talked about the struggle between Jay LaGarde and that carjacker, whoever it was. You told them there was a struggle?

A. Okay.

Q. You didn't mention anything about blood in there. You stayed away from it, didn't you?

A. I don't recall what I said or why I did it. Other than I dealt with what I had.

Q. Why don't you look at page 224 of your transcript, sir?

A. Of my deposition?

Q. Yes. Line 2. Tell me when you're there, please. I want you to read from line 2 through line 10.

A. Okay.

MR. BANKS: Can we show this video, Mr. Vincent. Page 224, lines 2 through 10.

(WHEREUPON, the video deposition of James Williams was [p.97] played as follows:)

EXAMINATION

BY MR. BANKS:

Q. That section of the transcript from your opening statement in the carjacking trial describes the struggle between Jay LaGarde and the perpetrator of the carjacking?

A. Yes.

Q. Is there any reference in there to blood?

A. No.

Q. So in your opening, in describing the struggle, you stayed away from blood?

A. Yes.

Q. And then when you questioned Mr. LaGarde, you didn't ask Mr. LaGarde anything about blood or cutting the pant leg or the perpetrator bleeding on his pant leg, did you?

A. I'm sure that I didn't.

Q. You stayed away from it?

A. I don't recall what my reason was. If I didn't ask about it, I didn't ask about it.

Q. But you don't recall why?

A. No.

Q. I mean, part of what you're trying to do here is you're trying to get a conviction of someone that was accused of being a carjacker, right?

A. Yes.

[p.98] Q. A violent struggle is something you would want the jury to know, right, ordinarily?

A. Mr. LaGarde testified regarding the violent struggle.

Q. But you didn't ask him anything about the blood?

A. If, again, I'll go by what's in the record. I don't recall much about this case.

Q. Mr. Williams, Jay LaGarde was an important witness in that case, right?

A. He was a victim.

Q. You wouldn't just put him on the stand cold?

A. Of course not.

Q. You talked to him. You prep him?

A. Of course I did.

Q. During the course of that discussion, do you remember Jay LaGarde asking you, Mr. Williams, What about that blood evidence? Whatever happened with that? What about the piece of swatch that they cut out of my pant leg?

A. I don't remember any part of, any conversation that I had with any of those children in trial prep.

Q. You told him that it was tested and inconclusive, didn't you, sir?

A. I don't recall what I told him, Mr. Banks.

Q. If you told him that, that would have been untrue, wouldn't it?

A. Well, that, I don't know what I told him.

[p.99] Q. That would have been untrue if you said that, right?

A. If I had said what?

Q. That they tested the blood evidence and the test was inclusive. That would have been untrue?

A. That's not true because I had no idea that any blood had been tested.

Q. Mr. Williams, Mr. Deegan assisted you with the trial. He was your number 2?

A. That's correct.

Q. You sat here in openings and you heard Mr. Aaron describe this process where there was a lead prosecutor in the case and a junior prosecutor. You were the lead?

A. I was.

Q. You were the experienced guy then?

A. I was more experienced than Gerry Deegan.

Q. Mr. Deegan was, what do they call them, juniors?

A. Yes.

Q. He questioned the crime scene technician, Mr. Cusimano, who had taken the swatch from Mr. LaGarde's pant leg, right?

A. Again, if the record reflects that.

Q. Why don't we look at page 226 of your transcript. We don't need to put anything up on the screen, if that will help you refresh your recollection.

Actually it starts at the bottom of page 225, line 20. I asked you, "One of the other witnesses in the trial was the [p.100] crime scene technician, Anthony Cusimano."

Do you see that?

A. Yes.

Q. And the next page, on 226, on line 8, I asked you, "The direct examination was conducted by Mr. Deegan?"

And you answered, "Yes."

A. Yes.

Q. But you were there the whole time. You didn't get up and leave the courtroom?

A. No, I didn't do that.

Q. So you heard Mr. Deegan ask Officer Cusimano what he did when he went to the scene, right?

A. Yes.

Q. And is it officer or detective, I don't know that what they call Cusimano?

A. Probably officer.

Q. Officer Cusimano described how he took photos of the scene and he dusted for fingerprints, and he collected a gun that the carjacker had, right?

A. Yes.

Q. But he wasn't asked a thing about the blood evidence. He wasn't asked about cutting a swatch out of Mr. LaGarde's leg, was he?

A. Again, if you have a copy of the transcript, I'll take your word for it that that wasn't asked.

[p.101] Q. Let's look at your deposition transcript. Page 228. I asked you, line 6, "But there's no question to Mr. Cusimano about the blood evidence that he took?"

And your answer was, "That's correct."

Right?

A. Again, the record of the trial will speak for itself.

Q. Did you lean over to Mr. Deegan at that point and say, Hey, Jerry, you forgot to ask him about the blood evidence?

A. I don't remember what I did.

Q. Isn't it true, sir, that you and Mr. Deegan did everything you possibly could during this trial to stay away from the topic of blood evidence so that you could avoid tipping off Mr. Thompson and his lawyer?

A. I can't say that that's true or not. I can only say that Mr. Thompson's lawyer was already aware of blood.

Q. Turn to page 229, please, of your transcript, sir. Lines 4 to 10. Tell me when you're there. This is your prior sworn testimony, Mr. Williams?

A. Yes.

MR. BANKS: Can we play this video excerpt for the jury.

(WHEREUPON, the videotape deposition of James Williams was played as follows:)

EXAMINATION

BY MR. BANKS:

Q. Let me ask you again. Was there an attempt by you and [p.102] Mr. Dugan, Deegan to stay completely away from the blood evidence in the opening and the questioning of all the witnesses?

A. I don't recall. Obviously we did.

(WHEREUPON, the videotape was stopped.)

EXAMINATION

BY MR. BANKS:

Q. Obviously we did, sir. You stayed away from the blood evidence, didn't you?

A. Look, if I can explain that, if questions were not asked about blood evidence, then they weren't asked. Now, can I now recollect why we did or didn't do that? I cannot.

Q. Can you think of any reason why maybe you didn't?

A. It could be that we weren't aware at the time that a test had been done and that if we started asking about blood evidence not knowing what the results were, that we could start creating reasonable doubt in the case.

Q. Creating reasonable doubt. That would be a terrible thing, wouldn't it, to create reasonable doubt by

suggesting that there was blood evidence that might not match Mr. Thompson? Would that be a bad thing?

A. Well, those are your words, Mr. Banks. We -- this case was tried based upon the evidence that we had. I was not aware of any blood test that had been done. Now, when I think back on that and I look through all the documents, I know for a fact that Mr. Bertel was aware. And I know for a fact that there was a [p.103] report. I know for a fact that there was an evidence card which was available to the public which showed that there was blood evidence in this case. And I know for a fact that Mr. Bertel was one of the finest lawyers that I ever had the privilege of trying a case. I used to learn from him.

Q. He was a friend of yours, too?

A. I thought the world of Mr. Bertel. Still do.

Q. But you got along with him. He was not just an adversary you fought with, he was a friend?

A. When the light came on at a trial, he did his job and I did my job.

Q. Why didn't you go to your friend? This wasn't about getting a conviction. This is about potentially convicting an innocent man. Why didn't you go to your friend, a man you knew, a man you respected, a man you thought of as a great lawyer and say, Hey, Numa, there is blood evidence here. I don't know what it is, but there is blood evidence here.

A. Mr. Banks, I already did that. I did that.

Q. You did that by saying you may wish to take blood from Mr. Thompson; is that what you're referring to?

A. Yes, absolutely.

Q. The March 11th hearing?

A. Yes.

Q. The one you didn't follow up on?

A. Yes.

[p.104] Q. Mr. Williams, if there was a deliberate decision not to use blood evidence in the Thompson case, not to refer to it, to stay away from it, that wouldn't have been your decision alone, would it? Dubelier would have been involved in that?

A. If Mr. Dubelier and I had discussed this case, and I have no recollection of that, I am not saying it didn't happen, I don't remember. I just don't remember.

Q. Would you turn to page 235 of your transcript. This is not for the big screen.

A. Okay.

Q. I'm sorry. I said 235. 234. I gave you the wrong page.

A. Okay. Which line?

Q. Wait a minute. I'm sorry. It's bottom of 234, line 24, I ask you, "Based on your knowledge of how the carjacking was staffed on the prosecution side, if a

deliberate decision was made not to use the blood evidence in the case, you would expect that decision to have been made by Mr. Dubelier, correct?"

And what was your answer, sir?

A. My answer was yes.

Q. We've already established he was one of the top prosecutors in the office, right?

A. He was.

Q. Did the blood evidence surface after 1985 during the rest of the time you were an assistant district attorney?

A. Not that I can recall.

[p.105] Q. You knew when Mr. Thompson was convicted of murder and sentenced to death it would be years of appeals, didn't you?

A. Yes.

Q. That's the way it worked in murder cases, right?

A. Yes.

Q. From 1985 to 1999, did you do anything over those 14 years to bring out the fact that there had been blood evidence in the Thompson case?

A. Other than to announce at the motion hearing that blood would be an issue.

Q. At some point, in cases like this, when someone is convicted of murder, if a court doesn't overturn the death sentence or the murder conviction, the appeals run out and the defendant is executed, right?

A. That's correct.

Q. You knew that the appeals ran out for Mr. Thompson in 1999, didn't you?

A. No, I'm not sure when they ran out.

Q. You knew that he was scheduled to be executed in May of 1999, didn't you?

A. I know that now. I didn't know it then.

Q. You know that today, that as of 1999, his appeals had run out?

A. Yes.

Q. Do you recall in the weeks or months before Mr. Thompson was [p.106] scheduled to be executed after having spent 14 years in jail, you got a call from my partner, Mr. Cooney? Do you recall that?

A. I do.

Q. Mr. Cooney told you at that time that Mr. Thompson appeals, Mr. Thompson's appeals had run out and that the execution was coming up?

A. I don't remember him saying that.

Q. You understood a date was set for the execution at that point that he called you, didn't he?

A. I don't remember that.

Q. Turn to page 134 of your transcript, sir. Tell me when you are there.

A. Which line?

Q. Here it is. It's line 8.

"Do you recall him telling you that a date had been set for Mr. Thompson's execution or would be set shortly?"

And your answer was, "I don't recall that."

But the next question was, "You understood that that was the situation when the call was made?"

And your answer was, "Yes."

So you understood from that call that this was a last-ditch effort by Mr. Thompson's lawyers to try to find out some facts in the case before the execution occurred, didn't you?

A. I seem to remember Mr. Cooney asking me about the case. I remember telling him that the only thing that I remembered about [p.107] that case was when Numa Bertel cross-examined the youngest LaGarde child.

That was literally the only recollection. I remember Mr. Cooney asking me about blood evidence, and I

remember telling him, I don't have any recollection about any blood evidence. That's what I seem to recall.

Q. You told him that there was no blood evidence?

A. He asked me about blood evidence and I seem to recall telling him that I don't have a recollection. And at that point in time, I did not.

Q. You told him you didn't recall or you said there was no blood evidence?

A. I don't recall exactly the words that I used. I remember him asking me something about blood evidence and I remember telling him I didn't have a recollection that blood evidence played a part in either case.

Q. Let's go a little bit further down that page. Are you on page 134?

A. 134 or 234?

Q. Question --

A. I'm sorry, what page?

Q. 134, line 15. "And do you remember Mr. Cooney asking you whether there had been any blood evidence in the carjacking?"

"Answer, Yes."

"Question: What did you tell him?"

[p.108] "Answer: I probably told him no."

A. Yes.

Q. Not I don't recall, no. Mr. Williams, you sat here and said you knew in 1985 there was blood evidence. It was all over the documents.

A. Mr. Banks, in 1999, when your partner called me, if he was your partner then, I answered his questions. At that point in time, I had no recollection of blood evidence. I had no recollection of standing in open court and saying that we may want to take the blood of John Thompson or we need to take the blood.

All of that came to light after I reviewed transcripts and talked to other people. So my answer is that at the time I talked to Mr. Cooney, I literally didn't remember anything about the case. I can remember I wished him good luck with whatever was left to do. And that's about it.

Q. So it was like, Good luck, Mr. Cooney, but there was no blood evidence?

A. Mr. Banks, again, my answer is that at that point in time, I didn't remember anything about that case other than what I've already told you. I didn't remember if there was blood evidence or not blood evidence. I just didn't remember.

Q. Mr. Williams, let's go back to 1985. We've talked a lot about the carjacking case. I want to discuss briefly the murder case.

* * *

[p.118] Q. And as a defense lawyer, you want to get every fact that you can of the prosecutors?

A. Yes, sir.

Q. Because sometimes witnesses for the prosecution may be lying?

A. Yes.

Q. Sometimes, not always. And you want evidence to show that they are lying, right?

A. Yes.

Q. I mean, if you can get evidence that's in the police files that show, for example, that a witness said different things at different times, that's favorable and helpful to you as a defense lawyer?

A. Certainly.

Q. Sometimes witnesses who testify are motivated by things other than the truth, right?

A. Yes.

Q. Money, it could be motivated by a reward?

A. Many, many different motivations.

Q. And if you're a defense lawyer and you have reason to believe that a witness is motivated by a reward or in it for the money rather than the truth, you're going to show that?

A. I'm going to, absolutely.

Q. That's important to your defense?

A. Absolutely.

[p.119] Q. In all these violent crime cases, whether cases you prosecuted as an assistant district attorney or as a defense lawyer, the investigations are usually done mostly by the police, right?

A. Yes.

Q. They gather a lot of facts in a murder or carjacking case?

A. Yes.

Q. And we talked about the kinds of reports they prepare, supplemental police reports that could be 20, 30, 40 pages long and police daily reports and witness statements. Right?

A. Yes.

Q. That's the kind of stuff that you as the prosecutor saw? Right?

A. Yes.

Q. You said in your practice as a district attorney you typically didn't turn that stuff over because of the policy that was set from the top, Mr. Connick; is that right?

A. I can answer the question that the policy was to follow the law. The policy was to follow the Louisiana Code of Criminal Procedure.

Q. And --

A. If I can finish.

Q. Certainly.

A. The Louisiana Code of Criminal Procedure did not mandate that we had to turn over police reports or witnesses' statements, [p.120] and that's a fact.

Now, there came a time, and before I testified here today, I was trying to recollect when it was when the Louisiana Supreme Court said you have to turn over initial police reports because it was a public record. And at that point in time, that became Mr. Connick's office policy. We followed what the law mandated us to do.

Q. We're in this federal civil rights case in federal court, right?

A. Yes, sir.

Q. And you would agree with me that it's not for you or me to tell the jury what the law is and what prosecutors have to turn over. That's for Judge Barbier, right?

A. Certainly.

Q. And we're not there at that part of the case yet. That usually happens at the end, right?

A. I don't understand.

MR. CARVER: Your Honor, I object. The witness has an opportunity to explain what he understood the law to be so he can make those decisions.

THE COURT: All right.

MR. BANKS: Your Honor, I'll withdraw the question.

THE COURT: Okay.

EXAMINATION

BY MR. BANKS:

* * *

[p.122] THE COURT: Okay.

MR. BANKS: I have a copy, Mr. Aaron, if that would be helpful.

EXAMINATION

BY MR. BANKS:

Q. Before our break, Mr. Williams, you talked some about this hearing that took place on March 11, 1985.

A. Yes, sir.

Q. In the carjacking case. This is some of the transcript of that hearing?

A. Yes, sir.

Q. Let's go to the second page of the document. These are some statements by you and Mr. Bertel with the Court at the end of that March 11, 1985, hearing? It's the last page of the transcript.

A. Yes.

Q. Okay. The last statement there by you, after saying, "Yes, sir, thank you," or before saying, "Yes, sir, thank you, Your Honor," is as follows: This is the statement that you're referring to when you said you referred to the blood evidence, right? The middle of the page?

A. Yes, that's correct.

Q. You said, "Your Honor, also, it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion, have a criminalist here on the 27th."

[p.123] A. That's what I said.

Q. You didn't say there was blood evidence or there wasn't blood evidence. You just said, We're going to file a motion?

A. That's what I said.

Q. And you never filed one?

A. That's correct. Well, I didn't. That's correct.

Q. Let's go to the murder trial for a moment. We talked at the beginning of your testimony about supplemental police reports, right?

A. Yes, sir.

Q. You told us how they can be lengthy, single-spaced, typed long documents with lots of facts from the police investigation?

A. Yes.

Q. In your book, sir, is Exhibit 30.

MR. BANKS: And I'm going to ask Mr. Vincent just to put the first page of Exhibit 30 up so we can see what a supplemental police report looks like. Okay. I don't know if you can make that any bigger. Okay.

EXAMINATION

BY MR. BANKS:

Q. This is the first page of a supplemental police report in the Thompson murder case, right?

A. Yes.

Q. Or we should call it the Liuzza murder case, right?

A. Yes.

[p.124] Q. In these reports, they often describe the crime that occurred and the evidence recovered from the scene?

A. Yes.

Q. They describe the witnesses the police interviewed and things the police heard from the witnesses?

A. Yes.

Q. All right.

MR. BANKS: Let's go to page 7 of this report, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. If you'll look at the top, it says --

MR. BANKS: Can you just cull out the top left?

EXAMINATION

BY MR. BANKS:

Q. It says, 7 of 35, so we have a 35-page report, and this is page 7.

A. [redacted].

Q. Now, the bottom paragraph has in it --

MR. BANKS: I'm going to ask Mr. Vincent to pull up some of that bottom paragraph.

EXAMINATION

BY MR. BANKS:

Q. A description of an interview with a witness, Paul Schliffka. He was the eyewitness who testified in the [p.125] murder case, right?

A. Right.

Q. Mr. Schliffka, well, the police report says as follows: "During an interview, Mr. Schliffka provided Officers Carter and Angelo with the following description of the suspect: Negro male, unknown age, six feet tall, slim build, dark complexion, close-cut black hair, wearing a black jacket and blue jeans."

Right?

A. Right.

Q. Now, at the time of Mr. Thompson's arrest, I guess six weeks after the murder, the clothing wouldn't be that useful as evidence maybe unless you found a black jacket or blue jeans, right? I mean, that's fairly routine clothing?

A. Correct.

Q. Six feet tall, that would be good to know. You could rule out perpetrators who are five feet tall and seven feet tall, right?

A. We should be able to.

Q. Close-cut hair, that's the kind of thing, close-cut black hair, that you would want to know, I mean, if you're a defense lawyer, you'd want to know that, right?

A. I want to know everything I can get my hands on.

Q. Every fact you can get your hands on. And this is what Mr. Schliffka told the police when he was interviewed right after the shooting, when his memory was fresh, right?

[p.126] A. That's what the report says.

Q. As a prosecutor and as a defense lawyer, would you agree with me that those kinds of witness descriptions made right after the witness saw something are the best ones, more important than the ones months later?

A. More reliable.

Q. Let's take a look at Exhibit 5. This is a police daily report. You told us about police daily reports, right?

A. Right.

Q. Now, this is a police daily report.

MR. BANKS: Can we just look at the top just so we can see what it is.

EXAMINATION

BY MR. BANKS:

Q. And this is really hard to read, but I want to represent to the jury here there is a date, it says "Victim, Ray Liuzza."

This is the police daily report for the Liuzza murder investigation?

A. It is.

MR. BANKS: Let's go down to page, James, to the description there again.

EXAMINATION

BY MR. BANKS:

Q. This police daily report has the same description from Mr. Schliffka, doesn't it. Six feet tall, slim build, dark [p.127] complexion. Here it doesn't say close-cut hair, it says short hair.

A. Yes.

Q. Those are consistent, short hair and close-cut hair?

A. Yes.

Q. I would like to show you a picture of Kevin Freeman. You know who Kevin Freeman is, right?

A. I do.

Q. He was indicted along with Mr. Thompson and charged with the robbery initially?

A. That's correct.

Q. And he testified, though, at Mr. Thompson's trial that he just saw Mr. Thompson do it and he ran away?

A. I believe he did.

Q. And you're aware that at the 2003 retrial Mr. Thompson testified that he bought the gun and a ring from Mr. Freeman, but that Mr. Thompson had nothing to do with it. He wasn't there that night?

A. I am not aware of any of the contents of that trial.

Q. All right. Let's go to the picture of Kevin Freeman.

MR. BANKS: That's Exhibit 26. Can we put that up.

EXAMINATION

BY MR. BANKS:

Q. Do you recognize that to be Kevin Freeman?

A. No.

[p.128] Q. Will you accept my representation?

A. Yes.

Q. If you look at that hair, would you say that's close-cut black hair in 1985?

A. No.

Q. You wouldn't say that's close-cut?

A. No.

Q. How would you describe it, sir?

A. I would take close-cut as shaved. Not bald, but shaved close to the skin.

Q. Shaved. Did you know what Mr. Freeman's nickname was?

A. Yes.

Q. What?

A. Kojak.

Q. Kojak. You remember the police show, Kojak, don't you?

A. Surely.

Q. I don't know if all of our jurors remember it, but what do you remember about the police detective Kojak?

A. He always had sucker in his mouth and he was bald.

Q. He was bald? You don't think Mr. Freeman got the nickname Kojak because he was a detective, do you?

A. I don't know when Mr. Freeman got that nickname, what his hairstyle was when he got that nickname, so I don't know. I can't comment.

Q. Do you think maybe he got the nickname Kojak from the [p.129] hairstyle?

MR. CARVER: Your Honor, assuming facts not in evidence.

MR. BANKS: Fair enough. I'll withdraw that.

EXAMINATION

BY MR. BANKS:

Q. How about Mr. Thompson? How tall was -- How about Mr. Freeman? Do you know how tall Mr. Freeman was?

A. I believe he was six feet tall.

Q. Okay.

MR. BANKS: Go to Exhibit 53, please, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. This is Mr. Freeman's rap sheet. There is another picture of him, right?

A. Looks like a different person.

MR. BANKS: Well, can you go to the top, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. It's Kevin Freeman's rap sheet, right?

A. Okay.

Q. And his height was six feet tall?

A. Right.

Q. So you're not sure about the hair length but at least the height matches the description that Mr. Schliffka gave; is that right?

[p.130] A. Yes.

Q. Now, Mr. Thompson, how tall is Mr. Thompson?

A. From reports, I believe he was around 5'8".

Q. So about four inches shorter than the person that Mr. Schliffka described?

A. Yes.

Q. Did Mr. Thompson have close-cut hair in 1984, around the time of the crime?

A. I remember seeing the photo that you displayed earlier.

Q. Why don't we show that again.

MR. BANKS: Can we go to Exhibit 7, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. This is a photograph of Mr. John Thompson and --

MR. CARVER: Your Honor, we object. The photograph does not depict Mr. Thompson the day of the murder or at the time of the murder. We don't know how Mr. Thompson wore his hair at that time.

THE COURT: When was that taken?

MR. BANKS: December 12th, six days after the murder, Your Honor.

MR. CARVER: Your Honor, hairstyles that --

THE COURT: Overrule the objection. That's six days after?

MR. BANKS: Yes.

[p.131] THE COURT: That is right? Okay.

EXAMINATION

BY MR. BANKS:

Q. You didn't see anything in the police report about Mr. Thompson's hair growing faster than most people, did you?

A. No. But in my experience, young men like that would wear their hair down. It could be plaited down, it could be plaited. That could be a comb out. I don't know.

Q. Did you ever see Mr. Thompson around that time in December of '84, with hair other than this?

A. I don't have a recollection of that.

Q. Just confirm the date.

MR. BANKS: If you would look at the placard, Mr. Vincent, on the lower right.

EXAMINATION

BY MR. BANKS:

Q. Do you see that, 12/12/84? That's the date the photograph was taken, right?

A. Yes, sir. That's what it says.

Q. It's a Police Department of New Orleans photograph.

A. It is.

Q. Right. Sometimes we call those mug shots?

A. Yes.

Q. Is that what you call it, too?

A. We used it call it BFI.

[p.132] Q. But it's not close-cut or short hair, is it? You wouldn't describe it that way?

A. That, no, absolutely not.

Q. As a defense lawyer, now that you are one, would you agree with me that having a description of the perpetrator as six feet tall with close-cut black hair or short hair and knowing that Mr. Thompson six days after the murder was five feet, eight inches tall with hair like that, that's important?

MR. CARVER: Objection, Your Honor, the witness did not say --

THE COURT: Overrule the objection.

EXAMINATION

BY MR. BANKS:

Q. Mr. Williams?

A. The answer to that would be the difference between five-foot, eight and six-foot tall is about that much (indicating).

And as a defense lawyer, I've had that thrown back in my face, that, and it would depend upon where the witnesses view the person. Were they close, far away, second story, first story. So the height wouldn't mean that much to me. The hair style --

Q. You would use that?

A. -- more so than the height.

[p.133] Q. So if you had the police report, as a defense lawyer, in your hands, at the trials of Mr. Thompson, with that description from Mr. Schliffka, you would definitely use that in your questioning of the witnesses?

A. If I did, absolutely, of course I would.

Q. That's because it's favorable to the defense, right?

A. I would agree with that.

Q. And if the defense lawyer had been given the supplemental police report, the defense lawyer would have known before the trial exactly how Mr. Schliffka described the perpetrator.

A. The defense lawyer did know.

Q. Before the trial, did the defense lawyer have that supplemental police report, sir?

A. My recollection is that the defense lawyer had Mr. Dubelier's discovery, which indicated that Mr. Schliffka had given that particular description.

Q. Well, you heard Mr. Cooney talk about that in his opening. Are you certain the written description given in discovery in the murder case said anything at all about the hair length?

A. I remember looking through some documents at the trial, and the discovery, one of them was that Schliffka gave a description different, and that was turned over to the defense.

Q. Schliffka said, in the -- strike that.

In the discovery that was produced to the defense, it said Schliffka described the perpetrator as six feet tall but [p.134] said nothing about his hair. Isn't that right, Mr. Williams?

A. I don't remember. If you have it, it speaks for itself.

Q. All right. We'll see if we can find that. Maybe Mr. Cooney or one of my friends back there can see if they can find that and we'll come back to it.

You certainly had that information though. You had the police report and you had the police dailies, right?

A. Yes. We had those reports.

Q. In preparing the murder trial against Mr. Thompson, you looked at those things?

A. I'm sure that I did.

Q. And you would agree with me that Exhibit 5, which is the police daily I just referred you to, and Exhibit 30, the supplemental police report, were not turned over to the defense?

A. I can't argue with that. I don't have a recollection yes or no.

MR. BANKS: Your Honor, may I approach the witness to show him the discovery request and the response?

THE COURT: Yes. Is that marked as an exhibit already?

MR. BANKS: It is, Your Honor. We have Exhibit 34 as the motion making the request and Exhibit 36 as the response.

EXAMINATION

BY MR. BANKS:

Q. Do you recognize Exhibit 34, Mr. Williams, as a discovery request from the defendant or at least is that what it appears to [p.135] be to you in the murder case?

A. Yes.

Q. Let's take a look at Exhibit 36. I want you to read the discovery response signed by Eric Dubelier. Paragraph one, what he told the defense about the description from Mr. Schliffka.

A. "Mr. Paul Schliffka described a man leaving the vicinity of crime scene as being approximately six feet tall. Additionally Mr. Schliffka failed to make an identification from a photo lineup conducted on January 17th."

Q. There is something missing there from Mr. Schliffka's description that he gave the police, isn't there?

Hair length?

A. Yes.

Q. It doesn't appear anywhere in that discovery response?

A. No, it does not.

Q. Thank you, sir.

Hair length was an issue in both the carjacking and the murder case, wasn't it?

A. I don't remember.

Q. I beg your pardon, sir?

A. I don't remember.

Q. You remember that one of the things that prompted the LaGarde family to call either the police or district attorney and identify Mr. Thompson was the photograph of Mr. Thompson that appeared in the newspaper when he was arrested and charged with [p.136] murder?

A. That's correct.

MR. BANKS: Let's look at that Exhibit 29, please.

EXAMINATION

BY MR. BANKS:

Q. Now, it just so happens the one on the top right is Little Richard. I'm not going to ask you about that one.

The one underneath, the bottom right, that's Mr. Thompson's photograph, right? I know it's awfully hard to see.

A. I agree.

Q. Someone looking at that photograph in the newspaper could immediately see a man with large hair, right?

A. Yes.

Q. And it was that photograph that was shown to the LaGarde children to ask them if the carjacker that they remembered looked similar to that?

A. I'm not sure I understand your question. Shown by the District Attorney's Office?

Q. Well, by the father of the LaGarde children who showed it to them first. Do you recall that?

A. I seem to recall that he showed them the picture that was in the *Times-Picayune*.

Q. That picture. You questioned Mimi LaGarde at the carjacking trial, right?

[p.137] A. I don't recall that. If it's in the record --

Q. It's in your book there as Exhibit 46, if you want to take a look at that.

A. I don't have any reason to disagree.

Q. Let's just go to that page. Just bear with me for a minute. Do you have it there, page 30? The start of that questioning?

A. I have it. The first page is 36.

Q. Let me just show you --

MR. BANKS: Your Honor, may I approach the witness to show him this page?

EXAMINATION

BY MR. BANKS:

Q. You see there sir, page 30, direct examination by Mr. Williams begins, "Mimi, I want you to speak up."

Mimi is Marie LaGarde, right?

A. Yes.

Q. You questioned her during that case, and if you go to page 36 in there, you asked her to describe the perpetrator of the carjacking and she said, "He was about 5'9" with an Afro sticking up."

Right?

A. "He had an Afro. It was kind of sticking up."

Q. Go to the next page. You see, she says he's about 5'9". Page 37?

A. "When you say small, what do you mean?"

[p.138] "Maybe 5'9". He wasn't a fat man. He wasn't a big muscular guy."

Q. Jay LaGarde also testified that he remembered the carjacker as someone who was about 5'7", right?

Take a look at Exhibit 46, at page 112.

A. Yes.

Q. So you've got descriptions 5'7" and 5'9", average them out, about 5'8". Mr. Thompson was consistent with that, right?

A. Okay.

Q. And they described an Afro sticking up, or Marie LaGarde did. That was consistent with the photograph of Mr. Thompson, an Afro sticking up?

A. I think she said "kind of an Afro."

Q. So you brought that out at the trial. You made sure the jury knew that that description matched Mr. Thompson.

A. I'm sure I did.

Q. But in the murder case, tried just three weeks after that, where the perpetrator was seen fleeing with a gun by Mr. Schliffka, where he described the perpetrator as six feet tall with close-cut hair, you guys accused Mr. Thompson of being that guy, too. Right?

A. I didn't accuse anybody of doing anything. The witnesses testified. The defense lawyers had all of that information before the trial, and they based their defense upon the discrepancies, and the jury heard all of that.

[p.139] Q. Help me understand that. In the carjacking case, where the description was 5'7", 5'9" with long hair, you use that against Mr. Thompson. But in the murder case where the description was six feet tall with close-cut hair, you hid half of that on Mr. Thompson, right?

A. I didn't hide anything, Mr. Banks, Number 1. Number 2, I don't know what I said. If you have a copy of what my argument was to the jury, that's what I said to the jury. These are witnesses' accounts of what they told the jury.

Q. Were there things in the supplemental police report that would have been helpful to Mr. Thompson's defense if they had been produced?

A. Based upon my recollection -- are you talking about in the murder case?

Q. Yes.

A. They had just, they had everything.

Q. The police report identified some people who lived in the area: The names Sheri Kelly, Rosemary Cash, and Steve McAlister. Do you remember their names being in the police report?

A. From looking briefly through the transcript this weekend, yes.

Q. They testified in the 2003 retrial, right?

A. I have no idea who testified in that trial.

Q. I'll just show you the stipulation that all of the parties agreed to.

[p.140] A. I'll agree with that. But I have no personal recollection of anything that happened.

Q. We'll put it up there. So you testified at the retrial, right?

A. Yes.

Q. And at the 2000 hearing?

A. Yes.

Q. If the defense counsel had seen their names in the police report, the defense lawyer might have been able to go interview them and hear what they actually heard, right?

A. I don't know that that didn't happen but certainly that would be your job.

Q. Well, you know the police report wasn't produced, don't you? That was one of the stipulations we read.

A. That's correct.

Q. As a defense lawyer, you would want to know the names of the people the police interviewed, wouldn't you?

A. Yes.

Q. Even if the police report itself doesn't indicate that those witnesses are necessarily helpful, a good, hard-working defense lawyer would want to know who the police talked to?

A. Would want to know everybody.

Q. And if that report is not produced to the defense, the defense can't know who the police talked to, true?

A. That's true.

[p.141] Q. Did you know at the retrial that Sheri Kelly said, and there was some reference to this by Mr. Aaron, that she saw the fleeing perpetrator run right by her window, and it was not Mr. Thompson?

A. I won't disagree with whatever it was she said.

Q. Do you know that in the police report there was a statement in there saying that Mr. Freeman had told -- excuse me, yes, Kevin Freeman had told someone that he was seen running from the crime scene by a woman?

A. When was that said?

Q. In the police report.

A. The supplemental --

Q. Excuse me, one of the police dailies.

A. Okay.

Q. Did you know that?

A. It is what it is. I have no recollection of that.

Q. Okay. I'm going to just turn to that police daily for a minute, if you'll bear with me, Mr. Williams. Do you know what, I'm going to come back to that because I don't have that right in front of me.

That's the kind of thing a defense lawyer would want to know, isn't it? If a witness like Mr. Freeman told someone that he was seen by a woman running from the scene, you as a defense lawyer would want to know that?

A. Yes. And to further amplify, I would want to know everything, every report, every interview that was generated.

[p.142]

* * *

Q. Absolutely true. You said before that another thing you might do if you were a defense lawyer in the Thompson case and that you do now is sometimes to show if a witness is motivated by something other than truth, like money, right?

A. Yes.

Q. If you have reason to believe as a defense lawyer that a witness is motivated by a reward, you're going to want to bring that up?

A. Absolutely.

Q. But to bring it out effectively, you need to have the [p.143] evidence showing that the witness was motivated by a reward? It makes it more effective, right?

A. Certainly.

Q. One of the witnesses against Mr. Thompson in the murder trial was a fellow by the name of Richard Perkins, who went by "Funk" Perkins; do you recall that?

A. I do.

Q. Did you know that "Funk" Perkins, Richard Perkins, testified at a hearing in 1995?

A. No.

MR. BANKS: I'm going to ask to show the witness something, Your Honor, if I may approach? This is that, this paper I referred to before that I didn't have in front of me from Exhibit 23. May I approach, sir?

THE COURT: Okay.

MR. BANKS: Thank you.

EXAMINATION

BY MR. BANKS:

Q. This is a police daily report, Mr. Williams. You see it's a police daily report?

A. Yes.

Q. In the Thompson case? And it says here, the last line of this third paragraph from the bottom, "Freeman also told Perkins that a woman saw him driving away from the scene."

You see that?

[p.144] A. Yes.

Q. You don't know of any woman who saw Mr. Freeman driving away from the scene other than Ms. Kelly, do you?

A. Mr. Banks, I don't have any recollection of that. It could have been. I don't remember the trial.

Q. Let's get back to Mr. Perkins.

A. Okay.

Q. There was a hearing in this case, and it's one of the exhibits admitted into evidence, a hearing in 1995, when Mr. Thompson was trying to get a new trial; do you recall that?

A. No.

Q. You weren't involved in that at all?

A. I was not.

Q. Would you go to Exhibit 55, which is in evidence.

MR. BANKS: Exhibit 55, I would like you to turn to page 94 first, Mr. Vincent.

THE WITNESS: Okay.

MR. BANKS: Make that little bigger just to show what's going on there.

EXAMINATION

BY MR. BANKS:

Q. This is questioning of Richard Perkins who was called as a witness by the defense. Do you see where that cursor is?

A. Yes.

Q. That's the same Richard Perkins who testified in the murder [p.145] case?

A. Okay.

MR. BANKS: Can we go to page 96, lines 11 through 25.

EXAMINATION

BY MR. BANKS:

Q. Mr. Perkins was asked, "What did you-all discuss with the district attorney?"

His answer was, "I don't remember what we discussed."

He was asked, "Did a discussion come up about a reward?"

He said, "They mentioned something about it."

"Question: Do you remember what they said?"

"Answer: They said something about you're entitled to one."

Let me just ask you: Was that a reference to you or Mr. Dubelier or you don't know?

A. I have absolutely no recall of that.

Q. So he then goes on to say, "The district attorney?"

"Answer: I told them I wasn't there for the reward, but they told me you were entitled to some reward."

Do you remember telling Mr. Perkins that?

A. No.

Q. Let's go to the next page. Mr. Perkins was asked, "Did you receive any money?"

"Answer: Yes, sir."

[p.146] "Question: How much money did you receive?"

"Answer: 10-05."

"Question: Is that $10,500?"

"Answer: Yes."

That's the kind of information a defense lawyer would find helpful in defending a murder case, right, if a witness was promised money?

A. Yes, absolutely.

Q. In fact, the district attorney in this case had tape recordings of Perkins and of his approach to the Liuzza family to get a reward, didn't they? It was part of the stipulation I read to the Judge, to the jury in the beginning, right?

A. Okay.

Q. But none of that was turned over the defense. That was also a stipulation?

A. Well, it must have been.

Q. Why do you say it must have been?

A. Because that was part of the defense. And that came out at the trial. And there was questioning as I recall. I don't have any independent recollection but I was reading that in the transcript.

Q. So the stipulation that we've all agreed to in this case, you think is wrong?

A. Of course not.

Q. You tried to make it sound to the jury in the murder case [p.147] like Mr. Perkins was never promised a reward, didn't you?

A. I don't recall.

Q. Well, let's go to part of your closing argument.

MR. BANKS: Your Honor, I'm going to ask to approach the witness again. Your Honor, may I approach?

THE COURT: Yes.

EXAMINATION

BY MR. BANKS:

Q. This is your closing argument, Mr. Williams, from the guilt phase of the murder case.

A. Okay.

Q. Would you go to page 353. I'm going to read what you argued to the jury as part of your closing. And you can tell me whether I'm getting this right. You argued as follows: "Let's talk about the reward money. You've heard that talked about mostly out of lawyers' mouths. Ladies and gentlemen, not one single person came and took that stand and told you anything about any reward money. There's not one word that is in

evidence in this case from people who took this stand regarding reward money. If there had been, you would have heard them put somebody on and say, This person has made a claim on the money."

There was then an objection and you continued, "So when you're in the back, ladies and gentlemen, you talk about, Well, this guy wants to get the money and this guy wants to get the money, I submit to you that you will do something that you [p.148] promised us you wouldn't do during voir dire, that you would go outside the scope of the evidence that was presented at trial. All this reward money is just hearsay. There's been no direct evidence."

Did I read that correctly?

A. Yes.

Q. You wanted this jury to believe in the carjack -- excuse me, in the murder trial when Mr. Thompson was on trial for his life, that there was no reward issue? That's what you were trying to tell them, wasn't it?

A. Well, again, and I apologize that I don't recall much of anything about that trial. My argument speaks for itself.

Q. Mr. Williams, were you good at what you did as a prosecutor?

A. I worked very hard at it.

Q. You had tried a lot of criminal cases, right?

A. I did.

Q. How many homicide cases would you say you tried while you were in Mr. Connick's office?

A. About 150.

Q. One of the reasons that Mr. Connick looked to you in the Thompson case and other homicide cases was because you believe he knew you did a good job and worked hard, right?

A. I would hope so, yes, sir.

Q. In all these prosecutions and in Mr. Thompson's prosecution, would you say that you followed Mr. Connick's policies?

[p.149] A. Absolutely.

Q. Everything you did in the Thompson case, you were following policies that had been set by Mr. Connick; is that right?

A. That's correct.

Q. You always complied?

A. Yes.

Q. In both the carjacking and the murder case, whatever you did, it was following the policies set by Mr. Connick?

A. To the best of my ability.

MR. BANKS: I don't have any further questions of Mr. Williams, Your Honor.

THE COURT: All right. Thank you.

Mr. Carver, do you have any questions?

MR. AARON: Your Honor, why don't we wait until tomorrow.

THE COURT: We can do that. Mr. Williams, the other side has some questions of Mr. Williams, but he has a doctor's appointment in the morning, right?

THE WITNESS: That's correct.

THE COURT: What time?

THE WITNESS: 9:00.

THE COURT: And what time do you estimate you can be here?

THE WITNESS: It's for some testing for surgery.

THE COURT: We'll have other witnesses. Why don't you

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[caption omitted in printing]

TUESDAY, FEBRUARY 6, 2007, 8:30 A.M.
VOLUME II
TRANSCRIPT OF TRIAL PROCEEDINGS
HEARD BEFORE THE
HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

* * *

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* * *

[p.158] testimony. So we're going to proceed with other evidence right now.

Mr. Cooney, are you going to proceed?

MR. COONEY: Yes, Your Honor, the plaintiff would offer the videotaped deposition testimony of Mr. Eddie Jordan.

THE COURT: Ladies and gentlemen, let me just briefly explain. A deposition simply means that some time before trial the lawyers, the parties got together, they had a court reporter present, and they took the sworn testimony of this witness in advance of trial, and they are going to play a portion of that for you here today. You're to consider and judge it just as you judge any other testimony, okay?

MR. BANKS: Your Honor, does the Court want a printed copy for the record or is that not necessary?

THE COURT: No. Our court reporter may want it.

(WHEREUPON, the videotaped deposition of Eddie Jordan was played as follows:)

Q. I take it you're familiar with the *Brady* rule?

A. Yes.

Q. What is your understanding of the *Brady* rule?

A. That a prosecutor has an obligation to turn over exculpatory evidence.

Q. When you say exculpatory, what do you mean by that?

A. It's evidence that would tend to -- to negate that person's guilt, the defendant's guilt.

[p.159] Q. In your view, did your predecessor's office have a reputation for fairness and integrity?

A. You know, I think that there was some questions raised about specific cases, and I -- I knew that that had happened so I -- I -- I'm not willing to say that he -- what -- what his reputation was.

I know that on those cases, there were -- there were some fair questions about whether evidence had been disclosed properly, and I know that later on there was at least a report indicating that the office had -- had failed to disclose *Brady* material on several occasions.

Q. Are you -- when you -- before you took office -- or let's say as of the time you took office, did you have a view as to whether your predecessor's office had displayed fairness and integrity in dealing with criminal defendants?

A. You know, that was one of the issues that came up during the -- the -- the political race. I think that some of the candidates, including myself, raised questions about whether -- whether the office had done all that

it could do to ensure that -- that evidence that defendants were entitled to was turned over.

So my sense is that -- is that several of us thought that -- that more could be done. And that's -- and that's what I tried to do when I became district attorney.

Q. What led you to conclude that?

[p.160] A. These cases that -- that I can't remember by name, I knew that there were several cases that had been reversed.

Q. Can you think of any disadvantages to a prosecutor of having open-file discovery, other than protection of witnesses and people associated with the victim?

A. Well, I -- I don't know of any -- any great disadvantages. I -- I think that some prosecutors perhaps want to -- they want an element of surprise, I guess, to some degree, and I don't know, maybe that -- that's their way of ensuring that there -- there's some surprise there.

Q. Would you agree that open-file discovery is a good way to help the truth come out in criminal cases?

A. I think so.

Q. Is it a good way to minimize *Brady* violations?

A. I think so.

Q. In a complicated criminal case where there are lengthy supplemental police reports and pages and pages of police dailies, many witness statements and

other materials that are available to the prosecutor, how is a prosecutor supposed to determine what is *Brady* material and what should be produced if there's not open-file discovery?

MR. AARON: Your Honor, Your Honor.

THE COURT: Wait, stop.

(WHEREUPON, the videotape was stopped.)

MR. AARON: May we stop the tape a minute? May we [p.161] approach?

(WHEREUPON, there was a bench conference.)

MR. AARON: This has absolutely nothing to do with what happened in 1985. Mr. Jordan didn't take office until 2003. They are asking him all of these hypothetical questions but they --

THE COURT: Wait a minute. I thought this was designated and there was no objection to it by you. It's designated in advance of trial. That's the whole point.

MR. AARON: My point is even though it's designated, you can make objections.

THE COURT: But my instructions specifically said you were to voice any objections, I think it was five working days before trial is my standard order.

MR. BANKS: It's already admitted into evidence.

THE COURT: So as far as I'm concerned, there is no objection. Let's go.

(WHEREUPON, the bench conference concluded.)

THE COURT: Can you back up just a few questions. Something is missing.

(WHEREUPON, playing of the videotape was resumed.)

Q. In a complicated criminal case where there are lengthy supplemental police reports and pages and pages of police dailies, many witness statements and other materials that are available to the prosecutor, how is a prosecutor supposed to [p.162] determine what is *Brady* material and what should be produced if there's not open-file discovery?

A. Well, I guess he could raise those questions with the supervisor.

Q. But in the course of a trial, if a witness says something that's inconsistent with a reference on page 26 of a 40-page supplemental police report, how is a prosecutor supposed to be able to remember that and at that point identify it to the defense?

A. I think it's difficult.

Q. Is that one of the reasons why open-file discovery is a good idea, because it's inherently difficult otherwise to manage the obligations under *Brady*?

A. I think that's true.

Q. Are you aware of any studies --

(WHEREUPON, the videotape was stopped.)

MR. CONNICK: Your Honor, may I approach the bench?

THE COURT: No, no. No, please, Mr. Connick.

MR. CONNICK: This is --

THE COURT: Mr. Connick, you need to sit down. You're not an attorney of record. You're a party to the case. Please don't interrupt. Okay. Start that question over, please.

(WHEREUPON, playing of the videotape was resumed.)

Q. Are you aware of any studies or analyses or memoranda discussing the extent to which the Orleans Parish District [p.163] Attorney's Office has complied with its obligations under *Brady* and other related cases?

A. I know there was a report that came out. Some kind of national group or national report that was looking at district attorneys' offices across the country, and I -- I don't remember the name of that organization, but it came out in the newspaper. It seems like I recall seeing -- seeing a short summary of what they found in terms of the Orleans Parish DA's Office.

Q. What's your recollection of what they found in this national report?

A. Well, they found that -- that -- that this office, the Orleans Parish DA's Office, had one of the -- one of the worst records, I think, in terms of *Brady*. So they did find that out.

Q. I'm going to show you a document we'll mark as Jordan Exhibit 1. It's a two-page letter dated January 5, 1998, from Judge Calvin Johnson to Mr. Connick.

Would you take a moment to review that and just tell me when you've done so.

Have you had a moment to review it?

A. Yes, I have.

Q. Have you ever seen this letter before?

A. No, I haven't.

Q. Have you ever heard about it?

A. No, I have not.

Q. Would you agree with me that a letter like this from a judge [p.164] to a district attorney or U.S. Attorney is an unusual or extraordinary event?

A. Yes.

Q. And you'll note though on the second page that Judge Johnson appears to have copied the other criminal court judges and a number of assistant district attorneys. Have you ever heard of a judge doing anything like that before?

MR. AARON: Your Honor, may I approach?

(WHEREUPON, the videotape was stopped.)

THE COURT: No.

MR. AARON: I found the objections.

THE COURT: Don't interrupt again, please. Let's continue playing it.

(WHEREUPON, playing of the videotape was resumed.)

Q. After describing on the first page of this letter what Judge Johnson says he witnessed and then the rules that pertain to *Brady* and the production of evidence to the defense, he says on the top of the second page, "Many of the discovery problems concerning exculpatory material could be solved by having an open-file discovery procedure."

Do you agree with that statement?

A. Yes.

(WHEREUPON, the videotape was stopped.)

THE COURT: Is that the conclusion of it?

MR. COONEY: It is, Your Honor.

* * *

[p.168] the record note my objection?

THE COURT: Yes.

MR. AARON: Thank you.

(WHEREUPON, the bench conference concluded.)

THE COURT: Who is the next witness?

MR. BANKS: Your Honor, the videotaped excerpts from Mr. Dubelier.

THE COURT: And this is about 10 minutes?

MR. BANKS: A little bit less perhaps.

THE COURT: Turn it on.

(WHEREUPON, the videotaped deposition of Eric Dubelier was played as follows:)

Q. Mr. Dubelier, it's correct that you were one of the prosecutors that tried John Thompson for the first-degree murder of Raymond Liuzza; is that right?

A. That's correct.

Q. And Mr. Thompson was convicted in 1985 of that crime?

A. He was convicted. If you say it was 1985, I'm certain that it was.

Q. Okay. And in that case you argued that Mr. Thompson should be sentenced to death; correct?

A. Yes.

Q. And, in fact, Mr. Thompson was sentenced to death in 1985; correct?

A. If it was 1985, that's correct.

[p.169] Q. And is it also true that you were involved, at least for some period of time, in the armed carjacking case against Mr. Thompson involving the LaGarde family?

A. Let me say that I don't remember that case being referred to as a carjacking in the past because I don't know that it -- I have no independent recollection of it involving -- being involved, or involving an automobile.

Q. Okay.

A. But yes, I had some involvement in an armed robbery case.

Q. Do you know how long Mr. Thompson was in jail for the Liuzza murder?

A. No, I do not.

Q. Okay, do you know how long he was on death row in Angola?

A. No, I do not.

Q. What were the responsibilities of the chief of screening when you held that position?

A. I had multiple lawyers working for me. I think it was ten or more. There were specialized screeners who did homicide, sex offenses, armed robbery and narcotics.

Then there were general screeners who did all of the other offenses. And then I think -- I think maybe

for a period of time even the magistrate lawyers reported to me.

So I -- I think that was the structure. I also had investigators and secretarial and other support staff.

Q. Can you describe where the chief of screening fit in the [p.170] overall hierarchy of the District Attorney's Office?

A. I never saw a flow chart or if I did, I can't remember. So I think this is probably where you sit is how you viewed that.

But I think the hierarchy was you had the district attorney, you had the first assistant district attorney and then below the first assistant district attorney, you had the chief of trials, the chief of screening. There was someone who ran the nonsupport division. There was someone who ran the juvenile division. There was a chief investigator.

Q. So there were -- a small number of people that -- that had the Number 3 position, if you will, in the office, beneath the first assistant and the DA?

A. Yeah, again, I can't remember whether, I know at one time there was a chief of magistrate. I don't know whether that person reported, when there was, whether that person was reporting to me or reporting directly up, but it was something like that.

Q. I would like you to describe for me, just generally, the training that took place at the District Attorney's Office when you were there.

A. I don't remember.

Q. Do you recall frequent -- how frequently there were training sessions?

A. No, I don't.

Q. Do you remember what subjects were covered in training?

[p.171] A. No, I don't.

Q. Do you recall any specific *Brady* training?

A. I don't recall specifically any training. I'm sure there was training. I just can't remember.

Q. Okay. Do you recall whether Mr. Connick himself provided any training to the district attorneys?

A. I can't recall.

Q. Do you recall whether there was somebody there that was responsible for providing training?

A. No, I don't -- I don't know. There may have been, but I don't know.

Q. Was there any division of responsibility, however, between what the junior district attorney would do and what the senior district attorney would do?

A. Not really, other than that the senior person was responsible for everything that went on. So to the extent the junior person was doing something, the senior person would be responsible for making sure,

you know, it was done right on any -- in any particular matter.

Q. Who was -- would you agree with me that paragraph 1 of Mr. Thompson's Motion for Production of Exculpatory Evidence asked you, the prosecutor, to identify eyewitnesses who gave physical descriptions of the killer?

A. That's the plain language of it, yes.

Q. Would you agree with me that the police report, which has [p.172] been marked as Dubelier Exhibit 4, shows that Mr. Schliffka gave a physical description of the perpetrator?

A. The motion asks for physical descriptions of the killer which are inconsistent with the defendant's appearance. I agree that the police report contains a description of Mr. Thompson.

Q. And would you agree that that description of Mister -- of -- of the perpetrator in the police report is inconsistent with the picture that we've previously shown, that was in the possession of the state in December of 1984?

A. No, I would not.

Q. You would not?

A. Nó.

Q. You think that the picture of Mr. Thompson, let's make sure that we're completely clear on this -- the picture of Mr. Thompson, which is Exhibit 6, that that

picture is consistent with the description by Mr. Schliffka of a person, Negro male, unknown age, 6 feet tall, slim build, dark complexion, close-cut black hair, wearing a black jacket and blue jeans. You think that Exhibit 6 shows somebody with close-cut black hair?

A. I don't believe the picture is inconsistent with the description.

Q. You don't believe, that's your testimony to the jury?

A. That's right.

Q. You don't believe that Exhibit 6 is inconsistent with the description --

[p.173] THE COURT: Stop it for a second.

(WHEREUPON, the videotape was stopped.)

THE COURT: Does anybody in the courtroom have a cell phone that's turned on? Because something is interfering with our sound system and a cell phone will do that.

If you have a cell phone, you have to turn it off, not just on vibrate or anything because it will interfere with the this electronic stuff.

THE CLERK: Or even a Blackberry.

THE COURT: Or even a Blackberry or anything like that. If you have it, turn it off, please, because something is interfering with our sound here.

MR. BANKS: It's possible, too, Your Honor, that that is on the audiotape from the deposition that maybe --

THE COURT: Well, it could be, but it started all of a sudden. It wasn't there at the beginning, and now all of a sudden, it just began. I don't know. Okay. Thank you. We can continue.

(WHEREUPON, playing of the videotape was resumed.)

Q. That's your testimony under oath?

A. Mr. Cooney, I have no idea on the night of this incident what Mr. Thompson's hair looked like. You're showing me a picture taken days after the incident. I don't know whether the hair was styled, whether it had something in it, whether it was combed down. The description from the witness, as far as I can [p.174] tell, from looking at the police report -- and I'm not trying to argue with you, what I'm telling you is, the description by the witness was at -- after midnight, in the dark, of an individual running some distance away.

The significance of the details of that description, could that fit the description of Mr. Thompson? Yes, it could. Could it not be Mr. Thompson? Maybe not. I don't know the answer to that question. I don't know what John Thompson looked like when Mr. Schliffka saw him.

I think the fact that there's a picture with his hair messed up and not appearing to be combed in any way doesn't mean that his hair didn't appear to the witness that night to be close cropped.

Q. Mr. Dubelier, I'm asking you, based on your own independent understanding of *Brady* and looking at Exhibit 4, which is the police report, and the description given by Mr. Schliffka, which is accounted in there, and Exhibit 6, which is the picture of Thompson, do you believe that that information, those two documents should have been provided to the defense under *Brady*?

A. I don't believe that the law obligated us in 1985 to produce that information. Had I do -- if I had it to do all over again, would I have produced it? I would have produced everything in the file. I would have let everyone look at every piece of paper in the file. Unfortunately I can't go back and do that, and I'm sorry.

[p.175] Q. And based on what you've seen here today in terms of what was produced and what was not produced, do you continue to believe that the steps that you took in 1985 were consistent with the policy of the Orleans Parish District Attorney's Office?

A. Yes, I do.

And again, Mr. Cooney, I'm not trying to argue with you.

(WHEREUPON, playing of the videotape was concluded.)

THE COURT: All right. Who is your next witness?

MR. COONEY: Your Honor, the plaintiff would offer the excerpts of the videotaped testimony of Mr. Connick.

THE COURT: All right.

(WHEREUPON, the videotaped deposition of Harry Connick was played as follows:)

Q. Good afternoon, Mr. Connick. My name is Gordon Cooney and along with Mr. Banks we represent Mr. Thompson in a lawsuit filed against you, Jim Williams, Eric Dubelier, Eddie Jordan, and the Office of the District Attorney, which is pending in the United States District Court for the Eastern District of Louisiana.

What types of things did you discount because you had no knowledge of?

A. About, about facts of cases and, and appeals and such as that. If you understand the way the office operated, I, I was not practicing law there. I was running an office. It was a big [p.176] staff of well over 200 people. And I stopped reading law books when I was -- when I became the DA, and looking at opinions. And my concern was the operation, the total operation of the office.

So you were asking about civil suits that were filed, I didn't know until some of them were over with that we, that I had even been sued. It was just something that I didn't do in the office and they were picked up by the people who were responsible for that, and they represented the office and concluded them.

Q. Are you specifically aware of any office policy manual that preceded 1987?

A. Not really.

Q. Mr. Connick, how long were you the district attorney of Orleans Parish?

A. I started in April of '74 and left in January of 2003, almost 29 years.

Q. Did you handpick prosecutors for any high-profile cases?

A. Sometimes I did. Sometimes I did.

Q. Would you characterize the Liuzza murder as a high-profile case?

A. I would say it was among that -- that category of cases that would fit that description.

Q. What we've marked for identification as Connick Exhibit 1 is a report dated May 19, 2005, entitled "Toward a Fully Integrated Criminal Justice System: Step One, Refocusing and Restructuring the DA's Office as Prelude to Systematic Coordination with the [p.177] Police."

Mr. Connick, have you ever seen this document before?

A. No.

Q. You haven't?

Were you aware of the fact that Mr. Jordan was conducting an analysis of his own office?

A. No.

Q. I would like you, if you would, to take a look at page 2 of the report.

A. (Witness complies.)

Q. It's really the first page that says "purpose" at the tops -- the top. And it reads in that first paragraph: "The purposes of this plan of action is to present an assessment of operations and resource needs of the Orleans Parish District Attorney's Office, to chart the changes the district attorney is taking to restructure practices to deliver the greatest possible operating efficiencies and effectiveness within current resource constraints, and to frame the debate for increased support."

Do you see that under the statement of purpose?

A. Yes.

Q. And down under Structure, in the last paragraph, one of the things it refers to is that, "The DA's office's culture has been scrutinized by interviewing individually or in focus groups more than 100 members of the Office, both legal and non-legal staff, analyzing the responses to a confidential questionnaire completed [p.178] by 66 of 89 ADAs, a response of 74%."

Do you see that?

A. Yes.

Q. I would like you to go to page 94 of the report, if you could.

A. (Witness complies.)

Q. And I'm going to ask you a question about the first sentence that appears on page 94, so if you want to read over that sentence and the page or so that precedes it just to familiarize yourself with that, that would be fine.

A. (Witness complies.)

I read it.

Q. Okay. Do you see where on page 94 it says, "Over half of the ADAs responding to the survey -- 52.3% -- agreed with the statement, 'I have not had the training to do the job that is expected of me.'"

Do you see that?

A. Yes.

Q. If your assistants had been asked whether they thought they received sufficient training or were asked the question that this group was asked, the assertion was, "I have not had the training to do the job that is expected of me," what percentage of them do you think would have agreed or disagreed with that statement?

A. That's conjecture.

Q. Do you recall being -- I think at the beginning of this [p.179] deposition, you testified that you recalled at some time that you were deposed in the Shareef Cousin case; is that right?

A. I was what?

Q. You were deposed in the Shareef Cousin case?

A. Yeah.

Q. Okay.

A. This is that case?

Q. Right.

A. Okay. I do recall it now.

Q. I would like to, in the interest of saving some time, refer you to page 7 and 8 of your transcript. And I direct your attention to page 7, line 5, and ask you to read page 7, line 5 through page 8, line 17. And why don't we just read through it while we're doing it.

The question that was asked, "And what is your understanding of a prosecutor's obligation under *Brady* and all of its progeny?"

"Answer: To turn over exculpatory evidence that we are aware of to the defendant."

"And by exculpatory evidence, what do you mean by that?"

"Answer: Evidence that demonstrates that he's not guilty of the crime with which he is charged."

"Would you agree that it would be more broad than that, that it would include all evidence that is favorable to the [p.180] accused on --"

"Answer: Well, I'm not aware that *Brady* says that."

"Question: So you would limit it only to evidence that proved that the individual is innocent of the charge?"

"Answer: Well, not necessarily. It would depend on what the evidence is."

"Question: And *Brady versus Maryland,* was as I am sure you will recall, a case involving the death penalty where the issue is whether you should turn over evidence favorable to the question of punishment. Do you recall that?"

"Answer: No."

"Question: Would you agree, though, as a principle that it is important to turn over all evidence that's favorable to the accused to the issue of punishment?"

"Answer: Well, I agree that we're supposed to turn over evidence that exculpates the accused, and I know that there are decisions that have amplified that and perhaps broadened that. But -- and aware of some of those decisions and the general obligation to make sure that we don't prosecute the wrong individual."

Do you see that?

Did you see that testimony?

A. Yes, I do.

Q. Is that still your view about what *Brady* requires?

A. No, I read this too and I would amplify that a little bit [p.181] more to -- to say that it should be broader --

Q. Why do --

A. -- than that.

Q. In what respect should it be broader?

A. Well, it, I think, I mean, I can't give you a law school definition of it, but I think that it has to, to support in some way the position that the accused has towards innocence, and I think it has to be material to some extent. Generally speaking, that -- that would be it. But I do know that courts have interpreted it broader. And whatever that interpretation is, that's what we're obliged to, to turn over.

Q. Why is it that you didn't give that testimony back in 2001?

A. I don't know. That was my reaction to the question.

Q. That was your best recollection in 2001, correct?

A. Why didn't I give a different answer when I was --

Q. My question was: This was your best recollection in 2001, correct?

A. Well, I wouldn't regard it as the best. I think I could have done better by that, but, but that's what I said.

Q. This was the answer you gave in 2001?

A. That's what I'm saying.

Q. After you gave that answer, did somebody point out to you that *Brady* was actually broader than that?

A. No, I read it myself. And, and I don't know why I said it that way because it should have been -- as I said before, should [p.182] have -- it's not a law school definition and it should have been a little broader.

And it's an elastic thing, according to some of the justices too, and that makes it a little more difficult to find a -- a standing definition of what *Brady* is. It depends on the evidence, I guess, but primarily the interpretation of *Brady* by judges.

Q. How about any reprimands, can you recall any instances where somebody in your office was reprimanded for failing to turn over *Brady* information?

A. No. Let me explain something to you, too, Mr. Cooney, about that. It's difficult to reprimand someone who doesn't work for you anymore. And only in rare instances does someone who is employed stay with us after -- is with us after this decision comes down because it's sometimes years, and they are well on their way after that.

So if you can tell me that this assistant failed to do this and what did I do in response to that, I'd be happy to try to answer your question. But as it's put to me, it's virtually impossible for me to give you a -- an answer.

Q. But you, you can't identify, sitting here today, any instance where you've reprimanded somebody in your office for failing to turn over *Brady* information?

A. No.

Q. Okay. Can you identify anybody in your office who was fired [p.183] as a result of failing to turn over *Brady* information?

A. No. Again, Mr. Cooney, I cannot fire someone who is not working for me. And in very few instances, as I said, where someone was still on my payroll, when the case came down, if, if, any instances, I recall Mr. Eddie -- Mr. Jordan was one. I questioned him. He had a hearing before the ethics board, and I queried him extensively about what happened. I even forget what his answer was. But he explained it to me, and I and others, apparently the disciplinary board was satisfied with the way he handled it.

Q. What is your recollection of what state versus Curtis *Kyles* involved?

A. I think what sticks out in my mind most is it wasn't a *Brady* case.

Q. That it was not a *Brady* case?

A. That's my recollection of it. But -- but I remember that his claim was denied by the United States Court of Appeals.

Q. You also remember that his claim was found to be meritorious by the United States Supreme Court?

A. What -- is there another end of that statement?

Q. Do you, do you recall that his claim was found to be valid by the United States Supreme Court?

A. Not really.

Q. Not really? What's your understanding of what the United States Supreme Court held in the *Kyles* case?

[p.184] A. I don't -- I stated earlier, and I repeat, that -- that I really haven't studied the case. I wasn't familiar with the facts. I didn't prosecute it. I didn't write the brief. I did argue the case. And if I read the decision, I have no recall of the details about it.

Q. Am I correct, Mr. Connick, this was a case in the United States Supreme Court regarding one of the prosecutors in your office, correct?

A. I don't -- I don't see any names here about who did it. I assume you're correct.

Q. Jim Williams. Do you recall that Jim Williams was the prosecutor in the Curtis *Kyles* case?

A. Jim who?

Q. Williams?

A. Oh, no, I don't recall that. I don't recall that.

Q. You don't recall that Jim Williams was the prosecutor in the Curtis *Kyles* case?

A. I don't recall that Mr. Williams was the prosecutor in that case.

Q. Did you instruct that any changes take place in your office as a result of the state versus Curtis *Kyles* case?

A. No. I told them that the existing policies and provisions should be carefully followed and that the -- the law on discovery had to be carefully followed.

I didn't want to change that. I was satisfied with [p.185] what our policy was. I'm not satisfied always with the implementation of the policy, but I was satisfied with the policy.

Q. Now, do you recall any discussion at that meeting whether it would have been unlawful for the prosecutors to fail to turn over the blood report if they did not know Mr. Thompson's blood type?

A. Regardless of the blood type, they should have turned -- whatever the results of the blood test, they should have turned that over.

Q. And why is that?

A. Well, with my poor -- my poor evaluation of *Brady*, I think I know enough to know that if they have some blood evidence, it has to be turned over. And that, certainly, the defendant is entitled to.

Q. All right. You don't recall raising questions during the meeting about whether or not there was a *Brady* violation in the absence or proof that the prosecutors knew Mr. Thompson's blood type?

A. No.

Q. Do you recall that Eric Dubelier and Jim Williams tried the murder case?

A. They may have. They were both sort of equal position in the office, and that wouldn't surprise me. But I'm not saying they did. I just don't know.

Q. And do you recall that Mr. Williams tried the arm robbery [p.186] case against Mr. Thompson?

A. I recall that, yeah.

Q. Do you recall that at one point in the armed robbery prosecution against Mr. Thompson, Mr. Dubelier was involved in that prosecution as well?

A. I don't recall any specifics about that involvement. I know that there's some discussion that he was, but to what extent, I don't know.

Q. Taking you back to 1999, you learned that some very important exculpatory blood evidence had not been produced in the armed robbery case, right?

A. I'm aware of that, yeah.

Q. The prosecutors that were involved in the, in the armed robbery case were the same prosecutors that were involved in the murder case, correct?

A. Some of them.

Q. Did you not think that it was appropriate to determine, in light of the fact that there was evidence hidden in the armed robbery case against Mr. Thompson, to determine whether there had been evidence hidden in the murder case?

A. I'm not aware that any evidence was hidden in the murder case.

Q. My question is whether you thought it was appropriate to even ask the question back in 1999?

A. No. Because there was no reason to ask a question out of [p.187] the blue on the -- on that issue.

Q. Would you agree with me that the prosecution of the armed robbery case was a part of the strategy of prosecuting Mr. Thompson for the murder?

A. Yes. Yes.

Q. And you didn't think that the hiding or the failure to disclose blood evidence in the robbery case, which was a strategic part of the murder case, didn't justify asking the question of whether there was nondisclosure of *Brady* evidence in the murder case?

A. Mr. Cooney, I'm sorry to tell you that -- that I didn't at that time.

Q. Mr. Connick, I'm going to place before you what was marked in Mr. McElroy's deposition yesterday McElroy Exhibit 9, which is the New Orleans Police Department supplemental police report for the Thompson case.

And I would like you -- the Thompson murder case. I would like you to turn to page 7 of 35, right here, and familiarize yourself with that.

A. (Witness complies.)

Q. You can keep it. First of all, do you recognize that as a supplemental police report for the Liuzza murder?

A. I have no idea what this is. I've never seen it. And I don't know whether it's a supplemental report or not.

Q. Does it appear to be -- to you to be the form of a [p.188] supplemental police report that was used by the --

A. Mr. Cooney, I read these documents from the police from time to time, but I don't -- I would have to have something tell me this is an incidental report or a supplemental report.

Q. If you want to flip to the front page, maybe that will help you, at the top.

A. I don't know what it is. I'll take your word. If you say it's a supplemental report -- I see that.

Q. Is there any reason that you have to believe that it's not a supplemental police report for the Liuzza --

A. No.

Q. Okay. On page 7, would you read into the record the description that was, that is put in the police report that was given by Mr. Paul Schliffka to the investigating detectives?

A. "Negro male, unknown age, 6 foot tall, slim build, dark complexion, close-cut black hair, wearing a black jacket and blue jeans. The subject was armed with a large blue steel revolver with a long barrel which he

held in his right hand. This description was later broadcast."

Q. Can we mark that for identification also as Connick Exhibit 11. So let's double sticker that one if we can.

MR. COONEY: I would like to mark this next document as Connick Exhibit 12. It was identified yesterday as McElroy Exhibit 10.

EXAMINATION

[p.189] BY MR. COONEY:

Q. Mr. Connick, I've placed before you a mug shot of Mr. Thompson. And I will represent to you that that is the mug shot that was taken of Mr. Thompson following the arrest of Mr. Thompson on December 12, 1984. I will further represent to you that that is six days after -- after the Liuzza murder.

Looking at that photograph, would you say that the individual in that photograph has close-cut hair?

A. No.

Q. In your view, in light of what is in the supplemental police report and that photograph of Mr. Thompson, would you regard those two documents as *Brady* material?

A. Yes. I think photographs and police reports, whether the original or supplemental, should be shown to the defense.

Q. If those two documents that we've just marked as Connick Exhibit 12 and Connick Exhibit 11 had not been produced to the defense, do you believe that would have been a violation of your office's policies?

A. It would have been a violation of the law and the policy, but you have to keep in mind that -- that it would have been a violation of the policy if they had done it intentionally. I think you have to make a distinction between the inadvertent conduct of assistant under pressure with a lot of case load doing something and someone purposefully saying, This is *Brady,* and I'm not going to give it to them. I'm going to deny that it exists. [p.190] That would be clearly a violation and contrary to the law. That would be clearly a violation and contrary to my policy.

Q. Would you agree that a policy of not producing police reports can lead to *Brady* violations, that if an office has a policy of not producing police reports, that that can lead to *Brady* violations?

A. Yeah. Among other things, yes. But -- but it -- but it doesn't follow that it will. But you are predicating the failure to turn over *Brady* evidence. It depends on something that perhaps they don't have to turn over.

Q. Mr. Connick, I've placed before you what has been marked as Connick Exhibit 13, which is entitled, Motion for Production of Exculpatory Evidence, Connick Exhibit 14, which is entitled, Answer to Motion for Production of Exculpatory evidence and Connick Exhibit 15, which is Amended Answer to Motion for Production of Exculpatory Evidence.

I want to focus on a couple of the requests in here and ask you a couple of questions about that. If you look first at paragraph Roman numeral one of Mr. Thompson's Motion for Production of Exculpatory Evidence, what that asks for are the names of any eyewitnesses and copies of any statements made by them. And it elaborates: "This request is based on newspaper articles obtained by the defense which indicate that eyewitnesses gave a physical description of the killer which is inconsistent with the defendant's appearance; do you see that?

[p.191] A. Yes, I do.

Q. So what the defense has done here is not just ask for the names of eyewitnesses, but to say that it was the defense's understanding, based on newspaper articles, that the state might have in its possession descriptions of the killer by eyewitnesses that were inconsistent with Mr. Thompson's appearance; am I right?

A. Yes.

Q. Okay. And I would like you to take look at the Answer for the Motion of Production of Exculpatory Evidence, and unfortunately the only copy that we have is unsigned.

A. I saw that.

Q. Would you agree with me that based on your review of the police report and Mr. Thompson's photograph, that that police report included a description, a physical description of the killer which was inconsistent with Mr. Thompson's appearance?

A. I read the report and I'm not familiar with all of the physical descriptions at that time, except what you've shown me. And I will agree that some are different than what the witness said.

Q. Somewhat different?

A. Different. Not entirely different but different.

Q. The photograph of Mr. Thompson which was in the state's possession, that's not somebody with close-cut hair, is it?

A. Again, as I said before, no, it's not someone with [p.192] close-cropped hair.

Q. Let's take a look at Exhibit 15. And do you recognize Mr. Dubelier's signature at the bottom?

A. Not really.

Q. You don't recognize that as E.A. Dubelier?

A. Not really.

Q. Okay. The first paragraph provides a description by Mr. Schliffka, and it says, "Mr. Paul Schliffka described a man leaving the vicinity of the crime as being approximately 6 feet tall. Additionally, Mr. Schliffka failed to make an identification from a photo lineup conducted on January 17, 1985."

Do you see that?

A. Yes.

Q. Do you see any reference to the hair length in that description?

A. No.

Q. Do you think that the description that the prosecutor gave in Exhibit 15 is a full and complete and fair description of what was in the police report?

A. No.

Q. Were you aware of any rule of law that allows a prosecutor to give an incomplete description of the perpetrator?

MR. GOINS: Objection. Assumes facts not in evidence.

THE WITNESS: I'm unaware of many Rules of law, but I [p.193] don't know of any -- I don't know how fully you have to give a description of someone. As a reasonable person, I would say you have to give a complete description. But reason is not always part of the law.

EXAMINATION

BY MR. COONEY:

Q. What was Mr. Dubelier's position in the office in 1985?

A. He was chief of screening, I think.

Q. And would you agree with me that that would be the third-highest position in the office, along with a

number of other people that had that same tier of responsibility?

A. Well, we never, we never defined it as a tier of responsibility. I didn't. There was -- there was the DA and the first assistant. But I would say that that could be considered by the chief of screening to be the third most important position. Chief of trials may have thought the same thing.

(WHEREUPON, playing of the videotape was concluded.)

THE COURT: All right. Who is your next witness?

MR. LITVIN: Nancy Wohl.

THE DEPUTY CLERK: Please raise your right hand.

NANCY WOHL,

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on her oath as follows:

THE DEPUTY CLERK: Please state your name for the record.

* * *

[p.312] **P-R-O-C-E-E-D-I-N-G-S**

TUESDAY, FEBRUARY 6, 2007
AFTERNOON SESSION
(COURT CALLED TO ORDER)

(WHEREUPON, the proceedings resumed at 1:45 p.m. after the luncheon recess.)

THE DEPUTY CLERK: All rise.

(WHEREUPON, the jury panel enters the courtroom.)

THE COURT: Please be seated. Call your next witness.

MR. BANKS: The plaintiff calls Bruce Whittaker.

THE DEPUTY CLERK: Please raise your right hand.

BRUCE WHITTAKER,

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE DEPUTY CLERK: Please be seated. Please speak directly into the microphone, state your name and spell it for the record.

THE WITNESS: My name is Bruce Whittaker, W-H-I-T-T-A-K-E-R.

DIRECT EXAMINATION

BY MR. BANKS:

Q. Good afternoon, Mr. Whittaker. I understand you're more accustomed to being where I am. You're a trial lawyer, sir?

A. Yes, I am.

[p.313] Q. How long have you been a practicing attorney?

A. Since 1980. I was sworn in October 1980.

Q. And you were also an assistant district attorney in Mr. Connick's office?

A. I was.

Q. When did you start as a district attorney or an assistant district attorney in the Orleans Parish District Attorney's Office?

A. It was around '82 to around '85. Maybe about a three-year period, kind of late '85 maybe, but it started, I think, in '82.

Q. I'm just confused for a moment. Those are the three years that you were an assistant district attorney?

A. Right.

Q. So around '82 to '85?

A. Through '85.

Q. And now you've left the office?

A. Correct.

Q. When in '85 did you leave the office?

A. I don't remember.

Q. It was after Mr. Thompson was prosecuted?

A. Yes.

Q. Before 1982, did you have any experience in the field of criminal law?

A. I was an assistant DA for a year and a half in Monroe, Louisiana, and I worked at the Louisiana Supreme Court central [p.314] staff, which basically dealt with criminal writs and appeals.

Q. What positions did you hold in the Orleans Parish District Attorney's Office?

A. I was a, in magistrate court for a little while. Then I was a senior in a couple of sections. Then I was a general screener. Then I was an armed robbery screener. Then I was a narcotics screener.

Q. That's a lot of screening. What does a screener do?

A. The police arrest somebody, write a police report, send it to the District Attorney's Office. The District Attorney's Office looks at the report, and basically makes a judgment: Is there a case here against that person? And then files a piece of paper accordingly. That's what screening is.

Q. And that piece of paper is a Screening Action Form?

A. You fill out a Screening Action Form in the process of screening a case, that's correct.

Q. So you get the materials from the police. The police reports, crime scene technician reports, other reports and documents showing what happened in the crime?

A. You get whatever they give you. The way it happens is if you're screening, all of a sudden it will show up a stack of Screening Action Forms, stapled to a report or reports depending on the case, depending on what they have. And that's what you work from.

Q. And your job was to decide whether you thought a prosecution [p.315] was warranted?

A. Correct.

Q. And in addition to deciding whether the prosecution is warranted, you might make some suggestions about things that the DAs handling the case could do?

A. Sometimes, yes.

Q. What did you do with the Screening Action Form once you finished filling it out?

A. You passed it on to somebody. I forget who. I think actually it was checked off on by the chief of screening, to see, I guess, if the boxes had been filled out, if it made sense or whatever. I don't know what they looked for.

And then I think it went from them to a typist who typed up a Bill of Information. That's the actual piece of paper that charges the person.

Q. And did your Screening Action Form then go to the district attorneys who would be handling and trying the case?

A. Yeah, as I recall, it would be part of the DA's file on the case. That plus the reports that were attached to it.

Q. In 1985, let's say the first half of '85 when you left, whenever that was, when you were in screening, who was the chief of screening?

A. I'm not certain. I think it was Dubelier for some part of my screening experience. I think he was chief of screening. When that was, I don't know.

[p.316] Q. Eric Dubelier?

A. Eric Dubelier, correct.

Q. When you did the screening in connection with the carjacking case brought against Mr. Thompson, am I right that Mr. Dubelier was the chief of screening?

A. I think that's right, yes.

Q. So you reported to him?

A. He was my supervisor, correct.

Q. Were you generally familiar with the way the office operated?

A. I think that's the right word. Generally. I was, yeah.

Q. You knew who the big boss in the office was?

A. Mr. Connick, yes.

Q. He set policies for the office and rules?

A. He was the boss, correct.

Q. And you tried to follow the rules set by the boss?

A. Correct.

Q. As a matter of fact, in everything you did, you followed the rules set by the boss to the best of your knowledge?

A. I think that's true, yes.

Q. You never had a case that you were handling where you said, I don't care if these are Harry Connick's rules, I'm doing it my way?

A. No.

Q. You tried your best to follow the rules?

[p.317] A. Yes.

Q. The job of a prosecutor in Mr. Connick's was office was to get convictions, right?

A. Part of it, yeah, sure.

Q. Did that mean not always disclosing everything the prosecutor had to the defense?

A. It depends on how you mean that. Under the law, the defense was entitled to certain things. We were not

to withhold anything they were entitled to, if that's what you're driving at.

Q. But there were some things that you didn't produce in the ordinary course?

A. That's correct.

Q. Like police reports and witness statements?

A. They didn't get much. The state of the law was such that the defense did not get much.

Q. It was not just the state of the law. That was the policy set by Mr. Connick, right?

A. We pretty much followed what the law required us to turn over and not much more; that's true.

Q. Mr. Connick -- there was no legal restriction. Mr. Connick could have said, Turn over police reports or turn over witness statements, if he wanted?

A. I think that's true. I think that's true.

Q. Let's talk about the Thompson case for a minute. You knew there was blood evidence in the Thompson case, right?

[p.318] A. Correct. Yes.

Q. How did you know that?

A. I think there was some reference to it in the police reports that I received.

Q. I want to go back for a minute because there was something I forgot to ask you. I was talking about when you started in the office and what you understood about the policies. Did you get any training when you started?

A. Not that I recall. It was on-the-job training, to my recollection.

Q. On-the-job meaning you learned how to do it as you were doing it?

A. Right. I mean somebody might have showed me how to fill out a Screening Action Form. I don't recall, like, sitting down in a class on how to do stuff like that. I think we would have meetings with more senior people, trial lawyers on how to deal with evidence. I recall that kind of stuff. I don't recall anything on a formal training basis.

Q. So they didn't sit down and do a little seminar for you on what *Brady* was and how to live with it?

A. Not that I recall.

Q. You would agree with me that under *Brady* there can be some gray areas?

A. Correct.

Q. Sometimes it's not crystal clear whether a document or piece [p.319] of information has to be turned over to the defense or not?

A. That's true.

Q. And the cases interpreting *Brady* from courts like this Court and appellate courts sometimes refine those rules?

A. True.

Q. It would have been helpful to have a little training, wouldn't it, to kind of show you when you started what the *Brady* rule was so you could deal especially with those gray areas?

A. I think it would be a good thing, yes.

Q. Because there wasn't training, young DAs like yourself were trying cases on their own, right? You would be out trying cases right away sometimes?

A. Depending on your level of experience.

Q. And decisions on whether to produce *Brady* material, whether material was *Brady* material and had to be produced, those kinds of decisions would sometimes get made by inexperienced lawyers, just a few weeks out of law school with no training?

A. I imagine that's certainly possible, yes.

Q. It was your practice also not to turn over supplemental police reports and witness statements generally, right?

A. I think so. When I was in the trial section, I think that's probably correct.

Q. And you were following the policies established by Mr. Connick on that, correct?

A. Correct.

* * *

[p.325] I think there was a special name for it, but it was a .357 magnum. Right. It had not been tested to determine that, no.

Q. Now, underneath you wrote, "Victim made photo ID. Will be in town 3/11/85, if physical desired."

That means Stewart LaGarde was going to be in town?

A. Correct.

Q. There was some sort of hearing in the case that you were expecting to take place, I guess, about two weeks after the Screening Action Form? Right? Because the Screening Action Form was February 25th?

A. Right. What happens is when I filled this out and passed it on, I'm telling the assistant DA who is going to get it pretty soon that LaGarde is going to be in town on 3/11, if they want to do a physical lineup. I don't know about a hearing but --

Q. So Mr. LaGarde could then look at witnesses in a lineup and pick out whether Mr. Thompson was someone he recognized?

A. Right. He had looked at a photo lineup, and I was saying if you want to do a physical lineup, he was going to be in town March 11th. He went to school in Virginia at the time of that screening.

Q. You wrote, "May wish to do blood tests."

A. Correct.

Q. That's because you knew there was blood evidence, right?

A. Correct.

Q. And where you got that was probably from something like the [p.326] crime scene technician report?

A. Right.

Q. Let's go to that. It's Exhibit 22. Your copy is almost impossibly small in that book in the print and it may be easier to read on the screen. Whatever works for you.

A. I think I can probably make it out here.

Q. This is a crime scene technician report, right? If you look at the top?

A. It is hard to read.

Q. Yeah.

A. Item, I see and then I see something I can't quite make out, but I'll follow your lead.

MR. BANKS: And let's go to page 4, Mr. Vincent.

EXAMINATION

BY MR. BANKS:

Q. Now, I know, it isn't necessarily easier to read on the screen, but I'm just going to read it to you and ask you if this looks consistent with what you see.

"One tennis shoe, white, right shoe, make FootJoy, with blood gathered from victim on scene."

Look about right?

A. Hold on one second.

Q. You're right it does say left.

THE COURT: You have that exhibit?

THE WITNESS: Yes, I do Judge, I'm having trouble [p.327] reading it on here. Let me look on the screen. One tennis shoe, okay. I see what you're talking about.

Q. And then beneath that it says, "One piece of victim's right pant leg with blood collected from victim on scene."

A. Okay.

Q. That would clue you in that there was blood evidence?

A. I'm assuming that's what clued me in, yes.

Q. It told you as a screener that the crime scene technician took a piece from the victim's, from Stewart LaGarde's pant leg and cut it off, brought it in?

A. That's what it looks likes, yes.

Q. You would expect that the crime screen technician was going to the cut some pieces off of Stewart LaGarde's pant leg, that he must have had at least some belief that that was the perpetrator's blood?

A. I'm assuming, yes.

Q. Because there would be no need to cut up Stewart LaGarde's pants unless --

A. Certainly you want to find out one way or the other, yeah.

Q. That's why you wrote, "May wish to do blood test." You were following up on the evidence?

A. I would assume, yes, correct.

Q. You actually talked to Stewart LaGarde when you did the photo ID, right? You sent him a photo ID in the mail?

A. Yeah, we didn't talk much, as I recall, we didn't talk a lot [p.328] about the facts on the phone because we were doing it long distance. And so, you know, what I was talking to him about wasn't recorded. I wanted to do it by letter. I think I told him I was going to be sending him something. I don't know if we talked too much about the facts of the case I guess is what I'm driving at.

Q. But you would have been able to find out from him whether there was any reason to believe whether that was his blood or the perpetrator's blood?

A. Oh, yeah, I certainly talked to him. No question about it.

Q. Sure. And blood evidence, on the pant leg that may come from the perpetrator, that's really important evidence in a case like this, right?

A. It could very well be, yes.

Q. I mean, if it matched Mr. Thompson, that's good evidence?

A. It could very well be very important evidence, yes.

Q. But of course, if it didn't match Mr. Thompson, it might prove that he was innocent?

A. Correct.

Q. It was an easy matter to get blood tested, wasn't it?

A. I would think so. I think the crime lab could do that quite easily.

Q. We now know the blood evidence in this case actually was tested, right?

A. Correct.

[p.329] MR. BANKS: Would you go to Exhibit 45.

EXAMINATION

BY MR. BANKS:

Q. This is another hard-to-read document, but, and we've seen it before. It's an April 9, 1985, crime lab report, and it's in your book, sir.

A. I've got it.

Q. You've got it there?

A. Yes.

Q. And you can see it's addressed to "District Attorney's Office, Attention: ADA Bruce Whittaker."

A. Correct.

Q. So they tested this blood evidence that you had read about. April 9, 1985, was two days before the trial?

A. Okay.

Q. Right? We've stipulated in this case.

A. I don't doubt, I have no reason to disagree with that.

Q. So if you get something like this, a blood report that shows that the blood was tested and you see down on the page, it was tested to be type B blood on the pant leg?

A. Correct.

Q. That's something that's just two days before the trial. You're not just going to drop that in the mail. You're going to want to make sure the DA who is trying the case has it.

A. You're asking me? Yes. Correct.

[p.330] Q. I mean, you're not just going to leave it somewhere or put it in the interoffice mail. That's why, am I right, that what you did is you took this report that was addressed to you and you brought it to Mr. Williams' office, and you put it right on his desk?

A. That's my recollection, correct.

Q. In the middle of the desk?

A. That's my recollection.

Q. Not under a bunch of stuff or with junk mail or --

A. I could have put it in an in-box you but certainly didn't put it under stuff. My recollection is I put it right on his desk.

Q. He was a friend of yours, right?

A. Correct. A colleague.

Q. He worked right near you?

A. Correct.

Q. So he could have asked you about it if he had any questions about it?

A. Correct.

Q. Do you recall saying to him, Hey, Jim, did you get that blood report or --

A. I do not.

Q. You just don't remember?

A. I don't recall any conversation like that, no.

Q. You just don't recall one way or the other?

[p.331] A. No.

Q. But you can't deny that you might have talked to him about it?

A. No, it's quite possible, yes. I don't know. I don't remember.

Q. You actually testified in the carjacking case, right?

A. About the photo lineup, right.

Q. You appeared and he was there?

A. Correct. He prosecuted it.

Q. And you don't recall whether at the trial of the carjacking case, you and he had any discussions about this very important blood evidence?

A. I don't recall any conversation about it, no.

Q. But you can't deny that you had a conversation. You may have forgotten?

A. Anything is possible. I do not recall a conversation about the blood evidence with Williams.

Q. You knew that Mr. Thompson was convicted of this, right? Of the carjacking?

A. Correct. Again, armed robbery. I think it came back attempted armed robbery, yes.

Q. The screening form that you wrote, "May wish to do blood test," that would have gone from you to Mr. Williams or Mr. Dubelier or both?

A. It should, it should have been in the armed robbery file [p.332] that they had in April when they tried the case. I screened it in February; it was tried a couple of months later. They should have had it.

Q. Did you know Mr. Thompson's lawyer in the carjacking case, Numa Bertel?

A. I knew him, yes.

Q. Did you work with him, I mean, against him from time to time?

A. I think a little bit, probably very little.

Q. Did you do anything to bring to Mr. Bertel's attention that there was blood evidence in the case?

A. No, I was not involved in the case at that point. Once I filled out the Screening Action Form, it was not my case.

Q. When you testified, though, at the carjacking or armed robbery trial, Mr. Bertel cross-examined you?

A. That's what the records show, correct.

Q. There was no question of you by Mr. Williams about this blood evidence or the blood report when you were on the stand, was there?

A. I believe I've reviewed that, and I think you're correct.

Q. And you certainly didn't do anything on the stand to bring it up?

A. I answered whatever questions were asked of me. No, I don't recall that being an issue.

Q. You knew that Mr. Thompson was convicted in the armed [p.333] robbery case, didn't you?

A. Yes, I did.

Q. And you knew they were going to use that in the murder case?

A. I can't say I knew that, but they did.

Q. That's what made it so important to get this blood evidence on a timely basis, April 9th, carjacking trial starting April 11th. I mean, time was of the essence here, wasn't it?

A. For what purpose, I don't know. I know things moved along quickly in this case.

Q. You knew that the carjacking conviction was used against Mr. Thompson in the murder trial?

A. Correct.

Q. Did you know that Mr. Williams put Marie LaGarde, the 16th-year-old victim of the armed robbery on the stand at the penalty phase of the murder case?

A. I did not know that.

Q. You wouldn't be surprised to learn it, though?

A. I take your word for it. I didn't know that.

Q. That's something a zealous prosecutor might do to help try to get the death sentence?

A. Yes. Yes.

MR. BANKS: Your Honor, may I have just one moment?

I don't have any further questions of Mr. Whittaker, thank you; although, defense counsel may.

THE COURT: Mr. Goins.

[p.334] CROSS-EXAMINATION

BY MR. GOINS:

Q. Mr. Whittaker, prior to joining the Orleans Parish District Attorney's Office, you worked for another district attorney, correct?

A. Correct. For a year and a half in Monroe, Louisiana.

Q. What training did you get in Monroe, Louisiana?

A. I don't recall anything other than on-the-job training.

Q. And you also worked for the Supreme Court for a period of time?

A. Correct.

Q. And you handled criminal --

A. Writs and appeals. We did advisory memos to the Court.

Q. And what training did you get there?

A. On the job. I mean, they showed me what a format was like to do a memo, and you follow the format.

Q. Now, in your job at the Supreme Court, did you have occasion to research or address the *Brady* issue in any of the writs and appeals that you were faced with?

A. I'm sure I did. I don't recall a specific one, but I'm sure I did.

Q. And you did that for how many years?

A. For one year.

Q. And then in your job at, I think it was the Fourth Judicial District; is that right?

[p.335] A. That's Monroe, correct.

Q. In your job for one-and-a-half years at the Fourth Judicial District, did you have occasion to address *Brady* issues?

A. I recall one case where I did a brief on that, yes. So I know I did at least once deal with it, but, you know, actually sit down and study it.

Q. In law school, is the *Brady* issue addressed at all in any course that you might have taken?

A. To be honest with you, I don't remember. They might have said *Brady v Maryland* but I think we dealt more with criminal procedure rather than, you know, the substantive defining what is and what is not *Brady*. I don't recall that.

Q. By the time you got to the Orleans Parish District Attorney's Office, you were familiar with *Brady*, were you not?

A. But I was familiar with it, yes.

Q. You spent at least two-and-a-half years and possibly some time at law school looking at *Brady* issues?

A. I had some familiarity with it, yes. No question.

Q. And you researched one issue?

A. Correct.

Q. When you came to the District Attorney's Office, what position did you obtain?

A. I was initially in magistrate court for a brief period of time, and I was a senior in section C.

Q. How long did it take for you to become a senior?

[p.336] A. It was very quick because I had been with a DA's office in another parish for a year and a half, which was, that was not the typical person. Usually you spend maybe a year, six months in magistrate court. Then you're a junior. Then you're a senior. So it might take you a year to go through that process. I had a year and a half already as assistant DA, so they made me a senior quicker than most.

Q. And you also had a year working for the Supreme Court?

A. Correct.

Q. Would that be about the time, two-and-a-half years or so of experience, that it would take for an individual to become a senior in the Orleans Parish District Attorney's Office?

A. Or even, they could even do it quicker, but yeah, a year, year-and-a-half, two years, yeah.

Q. So you had more experience than a new lawyer coming to work for the District Attorney's Office?

A. More than the typical, at that time, assistant DA walking in the door, yes.

Q. And you ultimately became a screener by the time that Mr. Thompson became embroiled in the situation that we're now addressing?

A. Correct.

Q. And a screener generally is more experienced than the other lawyers in the office; isn't that correct?

A. I think that's the way it was set up. They wanted attorneys [p.337] who had tried cases to screen cases, so I think that's true.

Q. Now, a screener plays a role in the determination of whether or not there is any exculpatory evidence that has to be provided to a defendant; isn't that correct?

A. I don't know if that's the case because the screener screens the case and doesn't make any decisions on what to turn over or not. Screener typically screens the case without regard to who the trial attorneys are.

As in this case, the case is screened, the Screening Action Form is filled out, and that's the end of it. Insofar as the screening is process is concerned, it's then in a trial section, handled by a trial lawyer.

Q. What happens with evidence that's collected by the police department? Where does that evidence, where is that evidence ultimately deposited?

A. Central Evidence and Property.

Q. Is it ever, is it ever turned over to the clerk of criminal court?

A. Sometimes it ends up there, yeah. I forget why some go, some -- but, yes.

Q. Is an attorney for a defendant, is that attorney permitted to review that evidence?

A. Yeah. Generally speaking, an attorney can go look at what evidence is being held in a case against his client.

Q. So was there any prohibition from the attorney in the

* * *

[p.340] A. Norris Vessel. It was an old murder case that had been reversed for some reason, and it was a second-degree murder case, as I recall, and I prosecuted it.

Q. Who was trying that case with you?

A. Gerry Deegan.

Q. And who tried the case with Mr. Dubelier?

A. I think that was also Deegan. I don't recall for sure.

Q. So Deegan was handling two high-profile cases back to back?

A. I think he was the junior in that section. I don't know if there was a senior in that section. There was something going on. I think that Judge Quinlan might have been new on the bench. There was some, maybe turmoil, in his section at the time. He was trying to get cases moving or trying to get his docket current.

Norris Vessel was an old case. It had been reversed. It had been tried by Judge -- I think he's dead now. I forget his name. But and so I was handling that case. They may have asked me, somebody might have asked me to try it, because I was an armed robbery screener. I was not assigned to a section. I think somebody asked me, Would you try this old dog?

I said, Okay.

I think Deegan was the junior in B, so he was going to assist in all of those cases, I think.

Q. So the very day that you put the report of the testing of the blood evidence on the desk of Mr. Williams, you and [p.341] Mr. Deegan were trying a murder case?

A. Possibly. I don't know, I don't know what day I put it on his desk. I know I put it on, my recollection is I put it on his desk the day I got it. When that day was, I don't know. I do know that week I was trying the Norris Vessel case. For some of those days.

Q. Did you ever have a conversation with Mr. Deegan about the blood evidence?

A. No. Not that I recall.

Q. To the best of your recollection, while you were working for Mr. Connick, was there any pressure on any of the DAs to get convictions?

A. I think there is pressure on DAs to get convictions, yes. I think there was. If the case is accepted, it's the belief of the office that it is a triable case. A winnable case. You wouldn't accept it unless you thought you had enough evidence to get a verdict proof beyond a reasonable doubt, guilty as charged.

So I guess in that sense certainly there was pressure. We filled out trial report forms. I don't know who looked at those, but you filled out a form at the end of a trial which would indicate whether or not you won or lost, so I guess there was that pressure to win, of course.

Q. Who screened the armed robbery case, I'm sorry, the murder charge?

A. I don't know.

[p.342] Q. Do you know whether or not it was Mr. Williams who screened that?

A. I don't know. It would have been Grand Jury indictment. Who brought it to the Grand Jury, I don't know.

Q. Do you know who the murder screener was?

A. I know for a time, Jim Williams was the homicide screener. Was he the homicide screener on this case? I don't know.

Q. And who was the chief of screening?

A. At that time, I believe it was Eric Dubelier.

Q. And again, the screeners are the more experienced lawyers in the office?

A. I think that was the judgment of the office, yes.

Q. When you were a screener, what was your desire? Was it more important to get the screening done properly or to get it done quickly?

A. Well, you wanted to move them, but you wanted to do it properly of course. I think you were doing both. You had, typically, you had time restrictions on how long you could take to screen a case. A guy could be released if you didn't screen it in a timely fashion.

They, as I recall, the office kept track of how slow you were on screening. They didn't want you to have too many cases that were getting old, unscreened. So there was a pressure to do it promptly. Of course, do it properly.

Q. Are there any other crimes that Mr. Thompson could have been [p.343] charged with in addition to the armed robbery in the screening that you performed?

MR. BANKS: Your Honor, I object to that.

THE COURT: What's the basis of the objection?

MR. BANKS: Your Honor, he's asked about other crimes for which Mr. Thompson could have been charged. There is no foundation.

THE COURT: Sustain the objection.

EXAMINATION

BY MR. GOINS:

Q. Were there any other policy makers in the Orleans Parish District Attorney's Office?

A. Well, I mean, Harry Connick was the boss. He said, he ran the show, as far as I knew.

Q. So there was no one else that was making policy in that office?

A. I don't know. I had, I wasn't involved in policymaking. There may have been committees doing stuff. I have no idea. He was the boss that I knew about that ran the show.

Q. Did you know Mr. Thompson's blood type at the time that the report was obtained?

A. No.

Q. Do you know whether or not either Mr. Deegan or Mr. Williams knew Mr. Thompson's blood type?

A. No.

[p.344] Q. Now, in the Orleans Parish District Attorney's Office, was there a practice of pre-trying a case before it went to trial?

A. Yes.

Q. And what exactly was that?

A. As I recall, it's been a long time and I don't know if I did it as often as I was supposed to do it, but you were to meet with maybe the chief of trials so that the chief of trials could determine whether or not you were ready to go to trial on a particular case.

I don't think it was done in every case. Possession of dope, burglary, stuff like that. I know I didn't do it on every case. I think you were, certainly it would be wise to do it on your more serious cases. I know that on a case-by-case basis, I would go seek out the counsel of a more, a more experienced trial lawyer, it might be my chief of trials. If it was an aggravated rape and there was some issue that I was concerned about.

But to answer your question, there was a policy of pre-trying cases. You were supposed to do that, yes.

Q. Was *Brady* evidence one of the issues that would be addressed in the pretrial of the case?

A. I would imagine so, yes.

Q. And did all juniors have to go through the pretrial of their cases?

A. I think so, yes. Certainly if they didn't do it with the chief of trials, I think their senior, you know, might make sure [p.345] that they were doing their job.

Q. Were there any meetings on a regular basis of the trial division in the Orleans Parish District Attorney's Office?

A. There were meetings on -- regular -- I would say irregular, on an irregular basis there were meetings.

Q. And what would be discussed at those meetings?

A. Policies, how, you know, filling out forms. There was a lot of, a lot of tracking of files. That seemed to be a constant bone of contention in the office so there might have been discussion about that. But --

Q. To the best of your knowledge, was *Brady* discussed in any of those meetings?

A. Not that I recall. May have been. I don't recall. I don't know.

Q. Now, you were questioned with regard to Mr. Connick's policy as it related to *Brady* material. And to the best of your recollection, what was that policy?

A. Follow the law. Turn it over. If it's *Brady* material, you give it to the defense.

MR. GOINS: I have no further questions.

THE COURT: Any redirect?

MR. BANKS: No, Your Honor.

THE COURT: Okay. Thank you, Mr. Whittaker.

THE WITNESS: Thank you, Judge.

(WHEREUPON, the witness was excused.)

[p.346] THE COURT: Who is your next witness?

MR. BANKS: Your Honor, Mr. Williams is here.

THE COURT: Do y'all want to call him now?

MR. BANKS: We can proceed with our case but Mr. Williams is going to testify on our case on their questioning, if they are not going to question him, that's their prerogative.

THE COURT: It's their choice. They know what his circumstances are if they want to take him.

MR. CARVER: Your Honor, we'll take Mr. Williams now.

THE COURT: Okay.

(WHEREUPON, the witness takes the stand.)

THE COURT: Mr. Williams, you're still under oath.

THE WITNESS: Thank you, Judge.

MR. CARVER: Your Honor, during my examination of Mr. Williams, I will be referring to some exhibits. I would like to hand a copy of those exhibits to the witness, and I'll also hand a copy to plaintiff's counsel.

THE COURT: All right. Thank you. Are these from the books that are already in evidence?

MR. CARVER: Yes, Your Honor.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. CARVER:

Q. Mr. Williams, can you tell us what your occupation is.

[p.347] A. I'm an attorney.

Q. And describe for us the education that you have gone through in your life.

A. Well, I graduated from LSU. I went to law school at LSU. When I finished law school in '77, I took the Bar exam in, I believe, February of '78, passed the Bar. I practiced for a brief period of time in Baton Rouge. I moved to New Orleans in 1980 and began working in August of 1980 in Harry Connick's office.

Q. Let's kind of work backwards. You said you were an attorney. What kind of law do you practice now?

A. Right now, my practice is about 90 percent criminal defense, 10 percent personal injury, various little domestic law.

Q. When you say criminal defense, what do you mean by criminal defense?

A. Well, I represent persons charged with crimes.

Q. And how long have you been doing that type of criminal defense work?

A. Ten years.

Q. Prior to that, at some point in time you began to work for the Orleans Parish District Attorney's Office, correct?

A. That's correct.

Q. And tell us, when was that again?

A. I started in August of 1980.

Q. And how long have you worked for the District Attorney's [p.348] Office?

A. I worked for Mr. Connick for 10 years, until 1990. I left and went into private practice until 1992. Then I went to work at the District Attorney's Office in Jefferson Parish for five years. And I combined being assistant DA in Jefferson Parish with a private practice.

Q. And for the 10 years you worked at the District Attorney's Office in New Orleans, who was the DA during that time period?

A. Harry Connick.

Q. When you worked at the District Attorney's Office underneath Harry Connick, did the District Attorney's Office have certain policies that you had to follow?

A. Yes.

Q. Who established those policies?

A. Mr. Connick.

Q. Did Mr. Connick have a policy with respect to disclosing what we call *Brady* evidence to the defendant?

A. Yes.

Q. Can you tell the jury what Mr. Connick's policy was with respect to disclosing *Brady* evidence to a defendant?

A. Well, everyone who worked in that office who was an attorney knew the requirements of *Brady*, and you were expected to follow that not only because it was office policy, it was the law and it was what would have been considered an ethical breach to depart from that law.

[p.349] Q. And you've kind of jumped ahead of me on my next question. What would happen to you if you failed to follow Harry Connick's policy?

A. You would be fired.

Q. Other than disciplinary action by Mr. Connick, what other deterrents were there for you to ensure you followed Harry Connick's policy?

A. Well, Mr. Carver, I was an attorney. I was licensed to practice law in the state. There are certain responsibilities and obligations that any attorney has

practicing law, and one of them is to follow the law. And to do otherwise would be to jeopardize your meal ticket.

Q. What do you mean by jeopardizing your meal ticket? Meaning what?

A. Well, if, if someone were to break the law, not follow the law, break the rules of Mr. Connick, I mean, you know, that person would likely lose their job.

Q. If you, a person did that, could they still practice law?

A. Well, being fired wouldn't necessary keep you from practicing law; however, there was the Bar Association disciplinary committee, and if they found, just like in medicine, if you don't abide by your oath, then you run the risk of losing your license to practice law.

Q. While you worked for Harry Connick, what policy did you follow?

[p.350] A. I followed his policy.

Q. What was Harry Connick's policy with respect to disclosing statements of witnesses?

A. Well, the law of Louisiana and the Louisiana Code of Criminal Procedure was written down under the discovery articles. There were certain requirements that we had as prosecutors and what evidence we had to turn over, if it was requested.

Back in 1985, the rules were that the statement of the defendant would need to be turned over if one

existed. The gist of any oral statement a defendant made would have to be turned over. Scientific evidence would be required to be turned over. Inculpatory evidence, *Brady* material (indicating), would be required to be turned over.

Q. What about statements of eyewitnesses?

A. Not required to be turned over unless there was a hearing and a judge ordered them to be turned over. I mean, from time to time, statements were turned over, but basically the policy of Mr. Connick was to follow the law, and the law did not require that all witnesses' statements be turned over.

Q. What were Mr. Harry Connick's policies with respect to disclosure of supplemental police reports?

A. Again, that was not an item that was required to be turned over by law. And it was the policy of the office that those would not be turned over unless a judge ordered them to be turned over.

* * *

[p.355] And then there were, there was the magistrate section, which handled first appearances, and there was the juvenile division. Each one of those divisions that I've mentioned had a chief who was in charge of the division. And those were the supervisors in the office.

In addition, in the trial division, depending upon what year we're talking about, there were either one, two, sometimes more chiefs of trial or deputy chiefs of trial.

Q. I want to focus, the relative time period for this is 1985?

A. Right.

Q. Obviously the relevant issue is a trial, an armed robbery and a murder. What levels of supervision and review were there in the District Attorney's Office during that time period with respect to, you know prosecuting and trying an armed robbery case or a murder case?

A. Okay. Generally, almost always, an armed robbery or murder case would be handled by one of the senior assistants. In each division of court, there were two assistant district attorneys assigned to handle the cases. One was referred to as the senior and the other was the junior.

Generally, almost always, the junior was the less experienced. Generally, the junior, you know, you paid your dues. You were a go-fer. You did a lot, a lot, a lot of work. Did a lot of paperwork. But generally the senior assistant was the attorney in charge of the cases.

[p.356] Now, if a case, such as a murder or an armed robbery, was going to go to trial, 99 percent of the time, that senior attorney would be meeting with his or her supervisor, the chief of trials. And going over the case, talking about the issues that were in the case.

As time went on, there was more attention paid to every case. Back when I started in the DA's office, back in 1980, it was stocked with, you know, just about

every single attorney in there was very, very, very experienced attorneys. All of them had been there for quite a long time. And there wasn't as much supervision as there was around the time that I came along in the '80s and mid-80s. And that supervision continued.

So the answer to your question is, if I'm in a section of court and I'm going to try a murder case, I'm going to meet with my supervisor for a lot of reasons, because, you know, that supervisor was more experienced than I was, and if there was an issue in the case and I had discussed that issue with my supervisor and something went wrong, one way or another, then I would have had the benefit of having discussed that with the chief of trials. So, you know, if I got called into Harry's office, I would have company instead of coming in by myself.

Q. In December of the 1984 time frame, 1985 time frame, what was your position at the District Attorney's Office?

A. I was the homicide screener.

Q. Mr. Whittaker had testified previously to you that typically [p.357] the screeners were the most experienced attorneys in the office?

A. That's correct. Mr. Connick's policy, the progression in the office was when you generally started out, you were placed in either the magistrate court, the juvenile court or the nonsupport court because those matters, they were all serious, anything that came to the District Attorney's Office was serious, less serious than a homicide trial.

Once you were in those divisions for a period of time, generally the next level progression was as a junior assistant in the trial division. If you did well there, then more than likely you would be promoted to becoming a senior assistant with a whole lot more responsibility.

After you did a certain amount of time at the trial division, the next level of promotion was in the Screening Division. And the reason for that, and it was a great reason, was that the most important job, one of the most important jobs in the office was the decision-making process on whether or not to accept a case or refuse a case.

And it certainly was better for there to be someone who had tried cases knowing what happens in court to be making those decisions as opposed to someone who had never tried a case.

Q. Well, the system you just described whereby getting the most senior experienced people in the screening division, who developed that system?

A. Mr. Connick did.

[p.358] Q. Now, I thought you were the screener of homicides. How did you get involved in the armed, in prosecuting the armed robbery case of John Thompson?

A. Mr. Dubelier asked me to.

Q. Mr. Dubelier, what was his position at the time?

A. He was the chief of screening.

Q. If he was the chief of screening, did he have more experience than you?

A. No.

Q. I'm going to back up a little bit and first ask you some questions about your education. You mentioned you went to law school. What are some of the basic subjects that you were taught in law school?

Or if that's too broad, let me narrow it for you. Do you recall what subjects there were in law school that were applicable to your duties as a DA, assistant DA?

A. Yeah, there was criminal law, there was criminal procedure. There was constitutional law. There was trial advocacy. That pretty much covered being a prosecutor.

Q. You obviously graduated law school and then the next thing to become a lawyer is take a Bar exam, correct?

A. Yes.

Q. What is a Bar exam?

A. That's the test that anyone who wants to become a lawyer has to pass. And generally, it's always after you graduate from law [p.359] school. It's a brutal, I can assure you I still have nightmares about it, test over five days, where on three alternating days you spend eight hours a day taking an exam on various subjects.

Q. The subjects that you have previously alluded to, criminal law, constitutional law, criminal procedure, are those subjects on the Bar exam?

A. Criminal law and criminal procedure were together under the criminal part of the exam, and constitutional law was a separate part of the exam.

Q. You obviously passed the Bar exam; correct?

A. Thank goodness.

Q. When did you first learn that there was a legal requirement to disclose what we call *Brady* for exculpatory evidence to a defendant?

A. I don't remember. Probably at some point during one of the criminal procedure courses that I took.

Q. Referring to law school?

A. Yes.

Q. So this is something you would have learned in law school?

A. Yes.

Q. And just to make sure we're talking on the same page here, when I say *Brady*, what am I referring to? Do you have an understanding?

A. Yes.

Q. Can you explain to me what *Brady* is?

[p.360] A. *Brady* material is material which would tend to show that someone was innocent of a charge they were accused of. It would be evidence that would be favorable to someone charged with a crime.

Q. Why do we call this *Brady*?

A. Because probably, I haven't read that, a man named Brady was convicted for something that he didn't do, and that came to the light of the courts of appeal, and they rendered an opinion which said this is the kind of evidence that has to be turned over to the defense.

Q. Is it fair to say that *Brady* is named after a Supreme Court decision?

A. Yes, that's correct.

Q. In 1985, how would you quantify your experience as a prosecutor?

A. I'd been working there for five years. I had tried a lot of cases. I had been assigned to a particular judge, Matthew Brandt, who was a tough judge. Very few people pleaded guilty in his division of court, and as a result of that, I tried a lot, a lot of cases.

Q. While you were working at the DA's office, what type of guidance or instructions did you receive on your obligations under *Brady*?

A. Well, I can't specifically tell you that I remember that there was a specific meeting about: This is the requirements [p.361] under *Brady*.

Everybody knew what *Brady* was. Okay. Most attorneys, I mean, you know, they kept up with what the law was. I know in the appellate division, every so often, every term, there would be advance sheets which were the opinions of the Fourth Circuit Court of Appeals, opinions of the Louisiana Supreme Court.

And I know I read those, I read what the law was. I mean, I suppose it's a lot like a doctor. You read medical journals. Now there's a requirement that even, all attorneys, including assistant DAs have to get continuing legal education. But back in '85, I don't think that that was a requirement. But for me, I read the decisions that applied to what I did. I read all of them.

Q. Now, just for, you know, the jury and the nonlawyers in attendance, when you say opinions, what are these opinions, how did these opinions --

A. Any time, for example, someone goes to trial on an armed robbery case, and let's say they are convicted of that case, they have a constitutional right to an appeal, whether they can afford it or not. If they can't afford it, a lawyer is appointed for them.

And back then, when, let's say I'm defending somebody accused of an armed robbery. During the course of the trial, if I think something is improper, I'm going to object to it. Okay.

And it used to be, a long time ago, you had to note an

* * *

[p.364] Q. You were referring to advance sheets on getting your guidance on *Brady*.

A. Yes.

Q. Let me ask you for your opinions that develop in the court of appeals?

A. Yes.

Q. What type of training was there at the DA's office regarding *Brady* material?

A. Again, I don't recall any specific training. I mean, I knew what *Brady* material is. I would assume every attorney in that office knew what *Brady* material was. And we understood our responsibility to follow the law, follow the ethics of our profession.

Q. With respect to the blood evidence in the John Thompson armed robbery trial, you were aware that blood evidence existed?

A. Yes.

Q. How did you become aware of the existence of the blood evidence?

A. My recollection is that Mr. Dubelier asked me to do the Motion to Suppress the identification hearing in the armed robbery charge against Mr. Thompson.

I reviewed the file on the Screening Action Form. Mr. Whittaker had noted that blood evidence or something about, You may want to take John

Thompson's blood. And I'm certain that I probably looked through the file and saw from the crime scene

* * *

[p.371] Q. Was that because of the discovery of this lab report?

A. Yes. And also the testing of the LaGarde kids and Mr. Thompson.

Q. Had you been aware of the existence of the laboratory report prior to the armed robbery trial, would you have disclosed that to John Thompson's attorneys?

A. Certainly.

Q. Let's switch gears from the armed robbery trial and focus on the murder trial of John Thompson.

Exhibit 34, which is number 10, what is that document?

A. Motion for Production of Exculpatory evidence.

Q. This is basically another written request now by John Thompson's attorneys in the murder trial asking for evidence from the state, correct?

A. Yes.

Q. Specifically, what are they asking for in number 1?

A. "The names of any eyewitnesses and copies of any statements made by them. This request is based on

newspaper articles obtained by the defense which indicate that eyewitnesses gave a physical description of the killer which is inconsistent with the defendant's appearance."

Q. You told us earlier the state responded back in writing, with a written response, correct?

A. Mr. Dubelier did.

Q. Exhibit 36, which is number 12, is that the written [p.372] response?

A. Yes.

Q. What eyewitness did the state disclose to John Thompson's attorneys?

A. Paul Schliffka.

Q. Why was Paul Schliffka disclosed, the identity of Paul Schliffka disclosed to John Thompson's attorneys?

A. This is all based upon recently refreshing my memory by reading the transcripts. Mr. Schliffka told NOPD that he saw one person leaving the scene of the homicide who was about 6 feet tall and had, I think, short-cropped hair, which was in conflict with the description of Mr. Thompson.

Q. Do you know what John Thompson's hair was on the night of Liuzza's murder?

A. No. There was descriptions given by other witnesses, I think, by Mr. Freeman, regarding the

description that were at odds with what Mr. Schliffka said.

Q. Were you trying to hide the existence of Paul Schliffka from John Thompson's attorneys?

A. No.

Q. You were present at the murder trial of John Thompson because you participated in the, in that murder trial, correct?

A. I did.

Q. If you turn to page 13, is Exhibit 137. I tell you it's the opening statements from John Thompson's attorneys. Before we [p.373] look at this, I apologize, I'll take it down for a second. Very briefly, what is the purpose of an opening statement when it's given by the defendant to a jury?

A. To tell the jury what you expect that your evidence would show and what, that's it.

Q. Let's take a look at what John Thompson's attorneys told the jury what he expected the evidence to show. Why don't you go ahead and read that aloud for us?

A. "Mr. Schliffka will testify that he was there, that he was there. He saw one man, not two. One. That that one man had short-cropped hair, that he was about 6 feet tall and that the hair was not bushy.

"You will see Kevin Freeman, you will hear testimony that when John went to jail on January

17th, and you will also hear testimony that prior to this incident he had a large bush of hair. Kojak doesn't, and you will see that. Mr. Schliffka saw one man run away."

Q. Prior to the murder trial, when he was making this statement, opening statement to the jury, how did John Thompson's attorneys know that Paul Schliffka was going to testify there was a man with short-cropped hair?

A. Well, I don't know.

MR. BANKS: Objection, Your Honor, this calls for speculation. Unless the witness has personal knowledge.

THE COURT: Sustained.

[p.374] EXAMINATION

BY MR. CARVER:

Q. Page 14, and this is, again, transcripts from the murder trial. This is the testimony of Paul Schliffka. Can you read the portion highlighted.

A. "He looked about 6-foot and had short hair."

Q. So obviously Paul Schliffka testified the perpetrator had short hair?

A. That was his testimony.

Q. During the murder trial?

A. Actually, I don't think you have it up there, he later testified during redirect examination that he used his hands to describe the hair. And that was before the jury as well. And I believe that was under my redirect examination.

And he also changed, originally he said it was 6-foot and on redirect examination I believe he said, 5'10" to 6-foot. This is Mr. Schliffka.

Q. During the murder trial of John Thompson, did the state hide evidence that an eyewitness saw a perpetrator 6 feet tall with short hair?

A. No.

Q. On page 15, and again, this is opening statements by John Thompson's attorneys to the jury before trial got started, can you go ahead and read that for us.

MR. BANKS: Page?

[p.375] MR. CARVER: It's page 34 on Exhibit 137 on page 15 --

THE WITNESS: "The conversation with Richard Perkins, you will have to judge Mr. Perkins' motivation. You will have to judge what $15,000 in reward money means to a person."

EXAMINATION

BY MR. CARVER:

Q. Who is Richard Perkins?

A. Was a fellow in the trial. His nickname was "Funk."

If I'm not mistaken, John Thompson sold him a gun and a ring that was taken from Mr. Liuzza for $25 and a bag of dope.

Q. Is it fair to say that John Thompson's attorneys are suggesting to the jury that Richard Perkins' motivation for testifying is suspect because he may be getting a $15,000 reward?

A. Yes.

Q. Did the state try to hide evidence that Perkins may be interested in a reward?

A. If we did, we didn't do a very good job of it.

Q. Obviously being sarcastic.

A. I apologize, but, no, we did not hide any evidence at any time.

Q. Exhibit 5, which starts on page 16, is it fair to say that is an NOPD daily police report?

A. Yes.

Q. And if you will flip and turn to page 3 of that report, first paragraph, can you read that for us.

* * *

[p.380] A. I believe the defense had Mr. Freeman's statement.

Q. And that statement and his testimony were consistent, Freeman admitted he was at the murder scene, in the area, correct?

A. Yes.

Q. According to this report, what is the name of the woman that allegedly saw Kevin Freeman?

A. In that paragraph, there is no name.

Q. What did you understand your *Brady* obligations to be with respect to disclosing this report to John Thompson's attorneys?

A. There was no obligation to disclose that report.

MR. CARVER: That's all the questions I have, Your Honor.

THE COURT: Okay. Redirect, Mr. Banks?

MR. BANKS: Yes, sir. Thank you.

THE COURT: Let me ask you, do you think you'll be a while?

MR. BANKS: I would say about 15 minutes probably.

THE COURT: All right. Did you say 10 minutes?

MR. BANKS: About 10 to 15 minutes.

THE COURT: Okay. Let's go. Is everybody okay on the jury?

MR. BANKS: Would you put up the last page he had on the screen. Maybe we'll take that middle paragraph that he had up.

REDIRECT EXAMINATION

[p.381] BY MR. BANKS:

Q. This is what Mr. Carver just showed you, Mr. Williams?

A. Yes.

Q. This is from one of the police daily reports?

A. Yes, sir.

Q. And you said this isn't *Brady* material?

A. No.

Q. I'm sorry, I thought Mr. Carver asked you whether you were obligated to produce this under *Brady*?

A. I don't believe that I was.

Q. Maybe I'm mistaken. You think it is *Brady* material?

A. No.

Q. Well, let's go through. Am I correct that *Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying?

A. No.

Q. You don't think that's right?

A. No. I believe that *Brady* material is evidence which would tend exculpate a person charged with a crime.

Q. So if Judge Barbier, and it's not our job to tell the jury what the law is, if Judge Barbier were to tell the jury that *Brady* requires you to turn over material that could be used to impeach a witness who is testifying against the defendant, you would disagree?

MR. CARVER: Your Honor, I object.

[p.382] THE COURT: Overruled. The witness can handle that question.

THE WITNESS: I would not disagree with that.

EXAMINATION

BY MR. BANKS:

Q. Now, you've got me very confused. Does *Brady*, in your view, require the prosecutor to turn over evidence that could be used by the defense at a criminal trial to show that the witness at the criminal trial is testifying in a way that's false or inaccurate?

A. I guess we're quibbling over words. My understanding of what *Brady* says, is that it would be evidence that would tend exculpate a person charged with a crime or would be favorable. I wouldn't --

Q. I'm sorry, keep going.

A. I wouldn't necessarily disagree with what you said. I'll change what I said.

Q. Now, Kevin Freeman was a critical witness against Mr. Thompson in the murder case, right?

A. He was.

Q. But his story was entirely different from what it says in this paragraph, wasn't it?

A. I don't recall exactly what his story was.

Q. Well, we have his transcript in there and we can always read that to the jury but I'll just tell you this says, "Freeman told [p.383] Perkins that they were out looking for someone to rob."

That's not what Freeman said at trial, was it?

A. I don't recall what he said at trial.

Q. It says they purposely cruised the St. Charles Avenue looking for a white man to rob. Freeman said something entirely different than that at trial, didn't he?

A. I don't recall what he said. What he said was on the record.

Q. It says here that Freeman ran back to his vehicle and entered his vehicle and drove away. But isn't it true that at trial Freeman testified that he ran away, that he didn't run to his car, that his car had run out of gas?

A. I remember him having, his car was low on gas.

Q. Okay. And it also says here Freeman told Perkins that a woman saw him driving away from the scene. He didn't say anything about that at trial?

A. I don't recall whether he did or not.

Q. Now, if those four or five things that Freeman testified to at trial were different from what's in the police report. This police report would be *Brady* material, wouldn't it?

A. That's hard for me to say.

Q. Why, you didn't understand *Brady*, you weren't trained well?

A. No, I was trained very well. Not every single discrepancy rises to the level of **Brady** material.

Q. There is gray area?

[p.384] A. Yes, sir.

Q. Training myself then, right?

A. My answer was, there is gray areas.

Q. Even though you went to law school and you read case reports and you read opinions as they came out, there were still gray areas to an educated lawyer such as yourself?

A. Yes.

Q. You didn't turn this report over to the defense, did you?

A. I don't, I didn't turn anything over to the defense, Mr. Banks, in the case. I sat second seat. Mr. Dubelier was in charge of this case; he made decisions, and all of this was done before I was even on the case. So what he turned over and didn't turn over, probably he's in a better position to answer that.

Q. You know there is a stipulation that this wasn't turned over to the defense, don't you?

A. If that's the stipulation, it is the stipulation.

Q. Let's just get the exhibit number here, because we read it before, we read the stipulation. Trial Exhibit 23. You'll defer to the stipulation on that, right?

A. Yes.

Q. Now, we talked a little bit about this issue of Mr. Schliffka and short hair. And you were shown some documents on that by Mr. Carver?

A. Yes.

Q. One of the documents that Mr. Carver showed, I believe, was [p.385] a discovery item, something that came out in discovery, and let me just get the exhibit number and maybe we can put it up there. Bear with me for a moment. I don't know if I wrote down the exhibit number. But I have it here. Hold on. Someone has to put it up on the screen.

MR. BANKS: Here it is, Exhibit 36. Could we put that up, Mr. Vincent.

And can we go to Exhibit 36, the numbered paragraph 1 and blow that up.

EXAMINATION

BY MR. BANKS:

Q. This was the written response to discovery that Mr. Carver showed you, right?

A. Yes.

Q. Paul Schliffka described a man leaving the vicinity of the crime scene as being approximately 6 feet tall. That's what Mr. Dubelier put in this response and that's what he signed?

A. That's correct.

Q. Your leader in the case, the guy above you?

A. Yes.

Q. Would you say that's the most accurate, complete description you could give of the description that was provided by Mr. Schliffka?

A. No.

Q. Can you think of any justification, any reason for leaving [p.386] out the reference to the hair length completely if you weren't trying to mislead the defense?

A. No, I don't believe that, because apparently the defense was in possession of the description of short hair because Mr. Couhig referenced it in his statement.

Q. Referenced it in his opening statement, and he made a discovery request talking about, this request is based on newspaper articles obtained by the defense, right?

A. Yes.

Q. That's what he said there, newspaper articles. Not a discovery response, not something that you said or Mr. Dubelier said, but a newspaper article?

A. My answer to that, Mr. Banks, it may very well be that Mr. Dubelier turned over Mr. Schliffka's statement because they had it at trial.

Q. It may be that he wrote 6 feet tall, left out the hair length completely, but then turned over the statement, maybe?

A. I think he would be in the best position to answer that question.

Q. You would just be guessing on it?

A. I didn't answer that.

Q. Now, when you go to question a witness at trial and maybe try to question the witness and pin him down or impeach the witness, in a criminal case like this, you could use the police report?

[p.387] A. Yes.

Q. You could use the witness statement? Right?

A. Yes.

Q. If the witness gave a witness statement, you could use that?

A. Yes.

Q. You could use the police daily, the things you didn't produce, you could use to question Paul Schliffka, right?

A. Yes.

Q. You can't use a newspaper report very effectively, can you?

A. Sure. Why not?

Q. Is it the same force, though? When you find a newspaper report saying something about the hair length of the perpetrator, an undefined thing in a newspaper report, would you find that as effective as a written statement signed by Paul Schliffka?

A. I may. It's up to what the jury thinks.

Q. What did the newspaper report say?

A. I have no recollection.

Q. It's not in evidence in this case, is it?

A. Apparently the, Mr. Thompson's attorneys saw fit not to put it into evidence.

Q. So today we don't know what was in the newspaper, whether it's said short hair, close-cut hair, small Afro or anything like that?

A. I don't recall what was in the newspaper.

Q. You would agree with me, though, that if Mr. Dubelier wanted [p.388] to provide the most complete and accurate description that Mr. Schliffka gave to the police, it would have been a very easy matter for him to write in 6 feet tall with close-cut hair?

A. That would have been very easy to do.

Q. Now, when Mr. Schliffka testified at trial, Mr. Carver showed you one of the things he said. After Mr. Schliffka got up and talked about close-cut hair -- incidentally, you questioned Mr. Schliffka, right?

A. I did.

Q. And then you called him on what's called redirect. You got to ask him some more questions?

A. Yes.

Q. Let me give you Exhibit 50.

MR. BANKS: May I approach, Your Honor?

EXAMINATION

BY MR. BANKS:

Q. That's Exhibit 50. That has some of the trial testimony. Would you turn to page 103.

This is the start of your questioning of Mr. Schliffka, right?

A. Yes.

Q. You said, "All right, Mr. Schliffka, you're still under oath. Now, could you describe, well, let me ask you this question first: You've previously testified that the person you saw had an Afro-type hair cut; is that correct?"

[p.389] And he said, "yes."

A. Yes.

Q. Did you try to steer him off of that short hair back to the word Afro?

A. I don't agree with your characterization of what I did.

Q. But Afro wasn't in the police report.

A. I spoke with Mr. Schliffka before --

Q. After --

A. May I answer the question, please.

Q. Yes, you may. Please.

A. While I don't have an independent recollection of doing this, in the transcript, it's apparent that Mr.

Dubelier and I, and I'm sure we did, both questioned him and we talked to him about what he saw.

And it may very well be that during the course of that conversation, he told us Afro. When we said, Describe the hair. Short hair, like short, cropped, bald. But I don't recall that.

Q. One thing a defense lawyer would want to do is bring it back, not from Afro but to what Mr. Schliffka told the police when he was questioned right after the murder. A good defense lawyer would want to do that, right?

A. I agree.

Q. And a good defense lawyer can't do that here without the description that Mr. Schliffka gave to the police at the time, on December 6th of 1984?

[p.390] A. Well, I will answer your question, I don't know. I don't recollect what's in Mr. Schliffka's statement which was turned over to him. If he said Afro, short hair or whatever.

Q. But we saw what was in the police report.

A. And you have a copy of his statement. It may very well be that Afro is in that statement. I don't recall that.

Q. Let's start with the carjacking. No, I want to stick with the murder trial for a moment.

You mention a reward. Mr. Carver asked you about the reward issue, right?

A. Yes.

Q. And he pointed out that in the opening statement given by Mr. Couhig, Mr. Couhig suggested to the jury they might hear something about reward, right?

A. No, that's not what he said.

Q. What did he say, to the best of your recollection, you summarize it for me.

A. I'll read, what he said.

Q. I think we have it right here. Here it is, 34, you go ahead sir.

A. Mr. Couhig said, "The conversation with Richard Perkins, you will have to judge Mr. Perkins' motivation. You will have to judge what $15,000 in reward money means to a person," and the rest of it.

Q. Now, that reward that was posted, the $15,000 reward, that [p.391] was public, right?

A. That was, yes.

Q. A lot of people knew about that?

A. Yes.

Q. But if Mr. Couhig didn't have the information that Mr. Perkins was promised a reward by a DA, he couldn't do anything with that, could he? All he could do is raise it in his opening?

A. Well, Mr. Couhig, on his direct examination, or cross-examination brought that up again and chose not to pursue those questions. I asked two questions about the reward money. Now, if I could further answer your question, Mr. Banks.

Q. Yes.

A. As far as the reward money, you know, one of the policies of Mr. Connick was that we absolutely would in no way, shape or form, ever get involved in reward money, who deserves it, who should get it. Anything like that.

My recollection, I have no recollection of what, who got reward money or didn't get reward money. All I know is that Mr. Couhig knew about the reward money, suggested, must have known that Perkins had made an inquiry about the reward money, but decided during the trial not to question Mr. Perkins about the reward money.

Q. Because Perkins denied it and Couhig couldn't prove it when you guys denied him the information he needed, right?

[p.392] A. I don't recall Mr. Perkins denying anything about reward money.

Q. But you did. You got up in your closing and you told the jury, if there was something about reward money, you would have heard about it.

A. Mr. Banks, what I said in my closing argument, when you take it in its context, was that there was no evidence about reward money at the trial. And since

there was no evidence, it would be unfair for the jury to speculate about what happened with the reward money.

Q. In the stipulation that we filed in this case, the uncontested facts, it points out that some of the things that the DAs had that were not produced were audio tapes of interviews with Richard Perkins?

MR. CARVER: Objection, Your Honor. That's not an accurate characterization of the stipulation.

THE COURT: Overruled. The stipulations were read to the jury. They will be in evidence. So jury can make --

EXAMINATION

BY MR. BANKS:

Q. Mr. Whittaker?

A. I don't recollect about those audio statements.

Q. You certainly didn't do anything to bring that out to the defense that there were audio tapes in the district attorney's possession?

[p.393] A. I don't know what audio tapes you're talking about.

Q. Would you agree with me, sir, that to impeach a witness you need facts to work with?

A. Yes.

Q. I want to talk about the blood evidence a little bit. I think you told Mr. Carver that if you had had this report that Mr. Whittaker says he left on your desk in the middle of the desk, you would have turned it over? The blood report?

A. What I would have done, if I had seen that report at that point in time, I would have turned it over, yes, sir, I would have.

Q. Because it was *Brady* material?

A. Not necessarily.

Q. Might be?

A. No, because I didn't know what the blood type of Mr. Thompson was, and I didn't know what the blood type of Mr. LaGarde was.

Q. Why would you have turned that lab report over then?

A. Because that was a written report that was generated in connection with this case. Just as the crime scene technician's report was.

Q. But you already had a written report. You had the crime scene technician report. You had written documents showing that there was blood evidence. You didn't hand those over to the defense?

[p.394] A. Well, that's because I made it clear at the motion hearing that that was going to be an issue, and that was the end of my involvement with that case. At that point.

Q. If you made it so clear at the motion hearing, why did you need to turn over the blood report at all? If you did your job at the motion hearing by saying, We may file a motion to take blood evidence, why would you have turned the blood report over if you had seen it?

A. I didn't see -- I don't recall seeing a blood report.

Q. I understand that. But you said if you had seen it. If you had seen that blood report, you would have turned it over?

Why, if you did your job at the motion hearing when you dropped a hint, why would you have had to do any more?

A. Because the law compelled me to. That was a written report generated during the case. I was duty bound to turn that over.

Q. What about the Screening Action Form? Wasn't that a written report generated in the case?

A. It wasn't a public record.

Q. What about the crime scene technician report? Wasn't that a report generated in the case?

A. It wasn't a report that was subject to discovery under the discovery articles.

Q. Does *Brady* limit your obligation to turn things over to public documents as you understood it?

A. No, sir.

[p.395] Q. If you had evidence that could exculpate Mr. Thompson and prove him guilty, you were obligated to turn it over whether it was a public document or not, right?

A. Absolutely correct.

Q. Now, you say this was, what, Mr. Bertel's fault that he didn't figure out the hint you dropped at the hearing?

A. No, I didn't say it was his fault.

Q. When you said, We may wish to file a motion, we may file a motion and the motion would ask the Court to take blood, is that when you felt you discharged your full *Brady* obligation at that point?

A. There was no *Brady* issue at that point in time.

Q. But what was that like dropping a hint?

A. You can say it however you want to say it, Mr. Banks. All I can tell you is that at that point in time, I was asked by Mr. Dubelier to do the Motion to Suppress the evidence. The trial was coming up. I read the note from Mr. Whittaker in open court with Mr. Bertel present.

MR. BANKS: Mr. Vincent, would you please put Exhibit 43 up on the screen. Can we blow that up a little.

EXAMINATION

BY MR. BANKS:

Q. This is the discovery response where Mr. Dubelier signed off and said, "Inspection to be permitted."

A. Yes, it is.

[p.396] Q. It was a request for scientific evidence, and Dubelier said, "Inspection to be permitted."

A. That's correct.

Q. And let's go to three to four. That's where it is. You see that, right?

A. Yes.

MR. VINCENT: Now, Mr. Vincent, I'm actually going to ask this witness because I don't think we can see from this. Is there a date on this? I see. There it is. It's the file date. Just a little lower on the report.

EXAMINATION

BY MR. BANKS:

Q. It's April 3, 1985, right? That's when that report was filed? Excuse me, the discovery response was filed?

A. Yes.

Q. Exhibit 43. You see it?

A. Yes.

Q. On the left side? April 3, 1985?

A. Yes.

Q. So it would be some time after April 3, 1985, when that discovery response was served that you would expect Mr. Bertel to have walked over to the evidence locker and checked out the evidence if he was doing his job, right?

A. What was the date of the motion hearing?

Q. The date of the motion hearing was March 11th, but this [p.397] discovery response, "Inspection to be permitted," was served April 3rd.

A. Okay.

Q. Okay. So this --

A. I can now answer your question.

Q. Right?

A. I wasn't sure about the dates. I would have expected Mr. Bertel, given that this was a matter that could be involved in a death penalty case, to go to Eric Dubelier and ask him, What evidence do you have? Let me inspect it.

Q. After getting this, right?

A. Yes.

Q. He also could have walked over to the evidence locker as you said, what is it called? Central Evidence and Property?

A. Yes, in the basement of the courthouse.

Q. He could have seen whatever evidence was in there?

A. He could have.

MR. BANKS: Now, let's go to Exhibit 17, please, Mr. Vincent. Can you blow that up a little.

EXAMINATION

BY MR. BANKS:

Q. This is what Mr. Carver showed you, the New Orleans Police Department evidence property card. This tracks the evidence in the case, right?

A. Yes.

[p.398] Q. In the carjacking case?

A. Yes.

MR. BANKS: Go to page 2 please.

EXAMINATION

BY MR. BANKS:

Q. Now, let's look up at the top. Chain of custody. This is what they did with evidence. They had a card like this that showed when it was in the locker and when it was checked out, correct?

A. Yes.

Q. Chain of custody. If we look here, the first entry looks to me that this blood evidence was checked out of the locker. Something was checked out of the locker, right, on April 4th?

MR. BANKS: Can you pull up, right in the middle.

THE WITNESS: I see April 4th.

EXAMINATION

BY MR. BANKS:

Q. You see April 4th. Evidence was checked out on April 4th. That's when the blood evidence was taken by a district attorney to the crime lab to be tested, right?

A. I don't know that.

Q. You don't know that?

A. No. I don't, I don't see that up there.

Q. The next date we see below that is April 11th. See that?

A. I see April 11th below April 4th.

* * *

[p.400] Q. Let's just focus on this for a minute.

A. I'm sorry. Go ahead.

Q. Let me just cover this. The blood evidence was, the blood report was dated April 9th, right?

A. I'll take your word for it.

Q. And something was checked out on April 4th and something was brought back on April 10th. Right? That's what that report shows?

A. I'm not clear on this.

Q. If that's right, that means that during the period of time starting the day after Mr. Dubelier's discovery response saying, "Inspection to be permitted," and up until the day before the trial, the blood evidence would have been gone? It would have been with the crime lab?

A. Well, like I said, I'm certain that there is a copy of that chain of custody which remains, which would have been available. All that does is shows who has the object. But --

Q. You don't know when or whether Mr. Bertel walked over there, do you?

A. I don't know that he ever did.

MR. BANKS: I would like to approach the witness and show him Exhibit 64.

EXAMINATION

BY MR. BANKS:

Q. Do you recall testifying at a hearing in the carjacking case [p.401] in June of 1999, after the blood evidence surfaced?

A. Yes.

Q. Mr. Bertel testified in that hearing, too, didn't he?

A. He did.

Q. If you turn to page 99, I would like to take a look at his testimony, which is already in evidence here.

He was asked after he got the document, the discovery response, that he go over. And if you look down to line 27, he says, "Went down to the evidence room and checked all of the evidence, asked them for any reports and we didn't get it."

"Question: You didn't see anything in the evidence room in connection with this case at all, the gun?"

"Answer: No, no. We didn't get any blood evidence in the evidence room."

"Question: Who did you see there?"

"Answer: The clerk who maintains the evidence."

"Question: Do you remember who that was?"

"Answer: No, I don't remember his name."

"Question: Did you personally go up there?"

"Answer: Sure."

He continues, I'm going to skip down a few lines.

Question on line 13: "And they didn't have anything over there?"

"Answer: They didn't have any blood evidence."

You don't have any reason to dispute that testimony [p.402] under oath by Mr. Bertel, do you?

A. As I read it, Mr. Bertel said, We went to check out the evidence, and we didn't get it. That doesn't mean it didn't exist. That means he didn't get it.

Q. And you certainly didn't tell him about it?

A. Well, other than what I said in open court that we wanted to take the blood of Mr. Thompson, I don't recall having any conversations with Mr. Bertel after that about blood evidence.

Q. You told us a little bit in the beginning of your testimony, the questioning by Mr. Carver about what you understood the law to be, what you understand *Brady* to be, right?

A. Yes.

Q. You said you knew that from law school and from reading cases; is that correct?

A. Yes.

Q. I think you said something about state law only requiring certain things to be turned over?

A. You would have to refresh my memory.

Q. Well, it was just a little while ago when you answered Mr. Carver's questions. You said there was some Louisiana criminal procedure rules or state law back in 1985 that didn't require supplemental police reports to be turned over.

A. The Louisiana Code of Criminal Procedure.

Q. And it didn't require witness statements to be turned over, except a statement of the defendant himself or a codefendant?

[p.403] A. Unless, unless it would be favorable to the defendant.

Q. Those set minimum standards, right? I mean, those set certain things that had to be turned over?

A. Well, that's one way to characterize it. It was the standard. It wasn't a minimum or a maximum. It was the standard.

Q. But there was nothing in that Louisiana Code of Criminal Procedure that says if you have an exculpatory blood report, you have to turn it over, is there?

A. No.

Q. There was nothing in there that said that if you have a witness statement that shows the witness is

lying on the stand at the murder trial you have to turn that over?

A. That's implicit within those articles.

Q. There is nothing in there that says you have to turn over a police report if the police report contains descriptions of a perpetrator that are different from the descriptions given in discovery responses by a district attorney? That's not in the state rules of procedure, is it?

A. It is.

Q. It's *Brady* that requires you to turn something over. That's a federal constitutional case, right?

A. That is, indeed.

Q. And that's the law that obligated you and Mr. Connick and everyone else in the office to turn over evidence that was [p.404] favorable to the defense?

A. And I followed that law.

Q. State law didn't trump *Brady*?

A. Well, we could have an argument about that for quite a long time.

Q. I don't want to have an argument, sir. Would you agree with me that whatever Judge Barbier tells this jury to have been the obligations of a prosecutor under federal law to turn something over that was favorable to the defense that that's the law that controls?

A. I would agree with Judge Barbier's jury charge 100 percent.

MR. BANKS: Excuse me, Your Honor, may I just confer for a minute?

I don't have anything further of Mr. Williams. Thank you.

THE COURT: Thank you, Mr. Williams.

THE WITNESS: Thank you, Judge.

(WHEREUPON, the witness was excused.)

THE COURT: All right. Let's take about a 15-minute recess. Close your notebooks and put them on your chairs or under your chairs, and please don't discuss the case while you're out of the courtroom.

(WHEREUPON, the jury panel leaves the courtroom and a brief recess was taken.)

(WHEREUPON, the jury panel enters the courtroom.)

[p.405] THE COURT: Please be seated, ladies and gentlemen. And the next witness for the plaintiff is?

MR. BANKS: Val Solino.

THE COURT: By deposition, as I understand it.

MR. BANKS: Yes, sir.

THE COURT: Ladies and gentlemen, this is another deposition, excerpts from another deposition. The difference here is, as I understand, this is not a video deposition. There is a transcript, a written transcript. And what we do in that situation is one of the lawyers for the plaintiff, in this instance, is going to play the role of the witness, so to speak, just for purpose of reading the answers. So Mr. Cooney will be reading the questions. Mr. Banks, you're going play the witness, right?

MR. BANKS: Yes, Your Honor.

THE COURT: And the witness is Val Solino?

MR. BANKS: Right, he's the designated representative of the District Attorney's Office.

THE COURT: And just remember what I told you earlier: This is just like sworn testimony. The witness was sworn, the court reporter was present, the lawyers for both sides were present. And so you should judge it just as you judge any other testimony. Okay. Mr. Cooney.

MR. COONEY: Thank you, Your Honor.

(WHEREUPON, the deposition transcript of Val Solino was [p.406] read as follows:)

DIRECT EXAMINATION

BY MR. COONEY:

Q. Good morning, Mr. Solino. When did you graduate from law school?

A. In 1982.

Q. What was your first legal job after graduating?

A. I worked for a solo practitioner who was doing basically insurance defense but would do anything that walked in the door.

Q. How long were you with the sole practitioner?

A. 13, 14 months.

Q. What was your next job?

A. The next job was at the District Attorney's Office in September of '85.

Q. In Orleans Parish?

A. That's correct.

Q. Did you get any training when you started the job?

A. Well, the job was on-the-job training.

Q. Meaning what?

A. Meaning I met with the supervisor for several hours the first day, who explained to me, you know, what needed to be done, how best to prepare for it, the first day, the next day, and perhaps the day after that.

One of the, there was the first day I would have met with the chief of juvenile who kind of ran everything down to me. [p.407] Like, the second day, and perhaps a hunk of the third day or as much as you

needed, but quite frankly, I didn't need any more than the first day's help. And once they could see you had it pretty much under control, you were allowed to handle the docket yourself and just pre-try the issues the day before so that you could be ready for the next day's court.

Q. Outside of juvenile court, if you look back to 1985, what kinds of cases generally were being pre-tried in the District Attorney's Office?

A. Every case. It was clearly, my understanding was a trial attorney did not take a matter to trial unless it was pre-tried and signed off on by a trial chief or a deputy chief.

Q. Suppose someone like Mr. Dubelier, who was the prosecutor, the lead prosecutor in the murder case had been preparing for Mr. Thompson's murder trial. Who would have pre-tried that?

A. He probably would not have pre-tried. Somebody with, at the supervisory level he was at probably would not -- would not have been expected to pre-try a case.

Q. Because he was at a high enough level within the office to be deemed supervisory?

A. He was the chief of screening and designated as a special prosecutor, and he would not have been pre-trying cases.

Q. So he was high enough to be deemed a supervisor himself, right?

A. Well, not only deemed, he was, in fact, a supervisor. And I [p.408] think at the time he probably was considered to be like the Number 3 guy in the office.

Q. So then Harry Connick, the first assistant, and then Eric Dubelier as a practical matter?

A. I wouldn't know because I wasn't in the chain, but I believe Eric considered himself to be the third in line behind the first assistant, yes.

Q. Today that would be consistent with your understanding that he was roughly the third in line behind Mr. Connick himself and the first assistant, right?

A. Yes.

Q. Mr. Williams was the lead prosecutor on the armed robbery case against Mr. Thompson, right?

A. That's correct.

Q. With whom would he have been expected to pre-try, if anyone?

A. Because of the interconnection between Eric Dubelier and with Jim Williams' stature within the office, the fact that the armed robbery was interconnected or made to interconnect with the homicide, it would not surprise me that Jim Williams did not pre-try, but I do not know.

I don't know what the chief of trials considered Jim's stature to be at the time. I know he was respected, but whether the chief of trials would have

expected Jim Williams to get her signature on his file before he proceeded to trial, I do not know.

[p.409] Q. Would it have been appropriate for Mr. Williams to pre-try it with Mr. Dubelier?

A. They may very well have discussed the case. What I'm telling you is, I don't know what freedom Jim Williams was given in September, October, whenever, in 1985, but he may have been allowed to try cases without pre-trying. I don't know.

Oh, I'm sorry, it's still me.

Now, what I'm telling you is that Jim may very well have had stature within the office. He may have been one of two or three people that the chief of trials may have had such confidence in that she felt that she did not need to pre-try the cases with him and that he could go off and do the cases on his own. And it very well may have been that in this case, because being special prosecutors, these two cases would never have been the responsibility of the trial division, so the trial chief would not have been looking to have any participation in these two cases. But to say that Jim would have felt a necessity to go to Eric for authority on the armed robbery case, I do not know.

Q. Other than the pre-trial process, which was typically done with the chief of trials, the deputy chief, was there any formalized mechanism for the higher level people in the office to determine whether a trial lawyer, prosecutor assigned to a case had complied with *Brady* obligations?

A. No, that possibility was placed on the trial attorney.

Q. In your view, if a prosecutor has information that a witness [p.410] in a criminal case is attempting to claim a reward and that that individual may stand to receive a reward if convicted, if a conviction is obtained, is that *Brady* material that is supposed to be produced to the defense?

A. If I would, you're asking me my personal opinion?

Q. I am.

A. If I were handling a case and I had a witness who had made a claim for a reward and/or paid a reward and was promised a reward, I would reveal the deal to the other side and hope to have that aired out before the jury.

Q. Yeah, okay, but here's my question. Just based on your understanding of the *Brady* rule, if the prosecutors in the armed robbery case had the crime laboratory report but did not know whether it matched Mr. Thompson's blood type, would they have been obligated to turn it over to the defense?

A. Your question is to use me as an example. If I'm holding a crime lab report that says blood on a shoe is B, and I have some reason to believe that the blood on the shoe came from the perpetrator, and I don't know what the perpetrator's blood type is, do I feel I have a legal requirement at that point to disclose that lab report? No. When it comes to my attention that the other guy's blood is different, then yes.

Do I have a responsibility to advise the defense attorney that blood or something that could be tested exists? If he doesn't already know that, I would hope

that a prosecutor [p.411] would bring that to the defense attorney's attention.

(WHEREUPON, the recitation of the deposition ended.)

THE COURT: All right. Thank you. Who is your next witness?

MR. COONEY: Your Honor, the plaintiff calls Joseph F. Lawless, Esquire.

Your Honor, can we approach?

(WHEREUPON, there was a bench conference.)

THE COURT: I think just as other witnesses have generally said what his understanding of what *Brady* is and requires, that's fine, but I don't want an hour lecture on *Brady*.

MR. COONEY: The focus of his testimony is going to be training, policies, practice; I mean, there may be some questions --

MR. AARON: He's going to go on qualifications and throw to me to question him on qualifications. Is that the way you want to do?

THE COURT: Yes, you qualify him, tender him, and then you can traverse.

(WHEREUPON, the bench conference concluded.)

JOSEPH F. LAWLESS,

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

MR. COONEY: Your Honor, may I approach the witness?

THE COURT: Sure.

* * *

[p.426] THE COURT: By the way, let me just state this for the benefit of the jury. I'm going to allow Mr. Lawless to testify as what's called an expert in the case. Ordinarily a witness is not permitted to give opinion testimony. They can only testify to facts that they know from their own personal knowledge or observance.

In the case of an expert witness where someone is qualified by reason of education, training, or experience or a combination thereof, the Court, I mean, that person may be allowed to testify as to opinions based on other information that is given to them or furnished to them.

So that's what it means to testify as an expert. And I'll give you more guidance on that when we give the final legal instructions. Go ahead.

MR. COONEY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. COONEY:

Q. So did you review any of the prior trial testimony involving the prosecutions against John Thompson?

A. Yes, sir, I did.

Q. What did you review?

A. I reviewed the 1985 armed robbery/carjacking trial and I reviewed Mr. Thompson's 1985 murder conviction. I then reviewed the transcript of the retrial of the murder conviction and the transcripts of the various hearings that were held between the [p.427] first murder conviction and Mr. Thompson's second trial and acquittal. I believe it was two or three proceedings.

Q. Did you review any deposition transcripts in the case, Mr. Lawless?

A. Yes, I did.

Q. Whose depositions did you review, if you can recall?

A. I reviewed the depositions of the defendants, Mr. Connick, Mr. Williams, Mr. Dubelier, I also reviewed the depositions of Mr. Whittaker, who testified earlier today. I reviewed the deposition of a gentleman named Val Solino. I reviewed the deposition of an individual, I believe was the first assistant district attorney, Mr. McElroy. And I reviewed the deposition of a gentleman named Jerry Glas.

Q. Did you review any documents in preparing for your testimony?

A. Yes, I reviewed the blood test that's been marked as an exhibit in this case, and the file jacket that was with the blood test. I reviewed a number of police reports, the police supplemental reports, the homicide dailies, all the deposition exhibits that were attached to the depositions of the witnesses that I read. And pretty much reviewed everything you have down there in those big thick binders.

Q. Have you been in court listening to the testimony of the witnesses since Monday?

A. Yes, I have.

[p.428] Q. And finally, have you considered any of the stipulated or undisputed facts in this case?

A. Yes, I did.

Q. Mr. Lawless, can you tell the jury what open-file discovery is?

A. Open-file discovery is what it sounds like. The prosecutor comes in, can meet with the defense lawyer and literally open the file for him to read it or can simply Xerox the contents of it and turn it over to the defense lawyer for his review.

Q. And what are the benefits of open-file discovery?

A. The primary benefit, in my opinion, is that the defendant gets a fair trial based on all the evidence. There is no gamesmanship. There is no hiding of

evidence or only turning it over in dribs and drabs. The criminal defendant gets a fair trial based on all of the evidence.

Q. Is the district attorney required under the law to implement open-file discovery?

A. No. That's a policy decision that the district attorney, the elected district attorney, the head man, that's a policy decision he makes.

Q. And has the American Bar Association issued standards for criminal justice?

A. Yes, it has.

Q. And can you talk just for a minute about how those standards were developed and what they are?

[p.429] A. In 1974, the American Bar Association standing committee on criminal justice standards undertook to come up with comprehensive and a consensus set of appropriate standards of behavior for everybody in the criminal defense system, both prosecutors and defense lawyers.

And the committee that made up the standards, that drafted them, was made up of prosecutors, defense lawyers and judges. The end result being a set of standards that are set up as a guide to appropriate professional conduct and behavior by both prosecutors and defense lawyers.

Q. And just on timing again, can you tell the jury when those standards were developed?

A. The first standards were developed and released in 1974. And then in 1980, they were revised and a second set of standards was promulgated.

Q. Now, did the ABA standards, the American Bar Association standards, do they address pretrial production by prosecutors?

A. Yes, they do.

Q. And is there a particular section that does that?

A. May I refer to my report just to refresh my recollection?

Q. Yes. And you're referring to your report, which has been marked as Exhibit 78, without objection; is that right?

A. Yes, sir.

Q. Okay.

A. The American Bar Association discovery standard 11-2.1 on [p.430] prosecutorial disclosure addresses what the ABA standards suggest to be the proper standard for pretrial disclosure by prosecutors.

MR. COONEY: Mr. Vincent, can you put that up for one second so the jury can see that.

EXAMINATION

BY MR. COONEY:

Q. Mr. Lawless, that identifies a number of things that the prosecutors, at least under the ABA standard, should provide; is that correct?

A. Yes, sir.

Q. Now, is a district attorney required to follow the ABA standards?

A. No. Again, that's a policy decision that the district attorney, the elected district attorney, the head guy, that's a policy decision the district attorney has to make.

Q. Now, based on your review of the evidence in this case, has the Orleans Parish District Attorney, under Mr. Connick, did they have an open-file discovery approach?

A. No, they did not.

Q. Did they follow the American Bar Association standards?

A. No, they did not.

Q. Now, if a district attorney does not follow open-file discovery, doesn't follow the ABA standard, is there anything in terms of a standard that he is required to do?

A. The district attorney is or would be required to have a very [p.431] clear statement of what his policy was. He would have to make the *Brady* obligations of the individual prosecutors very clear to them in terms of what specifically they were. And he would have to

emphasize in the strongest possible terms that the office takes the *Brady* obligations of a prosecutor seriously.

He would have to be looking him in the eye and essentially saying, We really mean this. This is something you have to do.

Q. Now, if you're not going to have open-file discovery, why would you, as the DA, have to do that?

A. Because every district attorney knows that at some point in a prosecutor's career they are going to come into possession of evidence that tends to be exculpatory of a defendant or tends to impeach other witnesses. And they also understand that failure to turn that information over under *Brady* is going to result in a serious constitutional violation of a criminal defendant's rights.

They also should know that if they don't have an open-file policy, then there's an obligation to make sure that those individual assistant DAs are very carefully schooled in what their *Brady* obligations were. They should know that *Brady* is an evolving concept. It's not just one case; it's one case and other subsequent cases that interpret that.

So the prosecutor, if you're not going to simply turn the file over to the defense lawyer, the head prosecutor has to [p.432] make sure that the individual prosecutors know exactly what it is they have to do.

Q. In your opinion, would a policy of instructing assistant district attorneys to, quote, follow the law, be sufficient?

A. Absolutely not.

Q. Why?

A. Because it doesn't really give them any guidance on what that law is. It simply says, You're on your own, figure it out for yourself.

And by doing it that way, you're not emphasizing the importance of actually doing it. It's almost dismissive: Follow the law.

Q. Now, based on your review of the evidence, Mr. Lawless, do you have an opinion about the adequacy of the guidance and the training that was given to the prosecutors in the Orleans Parish District Attorney's Office at the time of Mr. Thompson's prosecutions in 1985?

A. Yes, I do.

Q. And what is that opinion?

A. It's my opinion that the training and guidance that was given was completely inadequate.

Q. And what do you base that on?

A. Well, a number of things. There were, first of all, there were stipulations in this case.

Q. Let me stop you there for a second so we can take this piece [p.433] by piece?

MR. COONEY: Mr. Vincent, could you put up uncontested facts TT and UU.

EXAMINATION

BY MR. COONEY:

Q. And Mr. Lawless, could you take a look at the single listing of uncontested facts in front of you and read from uncontested material facts TT and UU, please.

A. I'll have to read from the screen I don't have them in front of me. TT says, "Defendants have not provided or identified any written policy promulgated the District Attorney's Office concerning *Brady* that predates a February 1987 policy manual other than the Code of Professional Responsibility which concern *Brady* and which had been in existence since 1970."

UU states, "None of the district attorney witnesses recall any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson."

Q. So one of the things that you base your opinion on is from those stipulated facts?

A. That's correct.

Q. Now, did you also base your opinion on any of the testimony in the case?

A. Yes, both Mr. Williams and Mr. Dubelier, the deposition of Mr. Dubelier indicated they had no recollection of any kind of *Brady* training at all.

[p.434] Q. Okay.

A. There was also earlier today, if you recall the testimony of Mr. Whittaker, Bruce Whittaker, who said that in *Brady* there was a lot of gray area and to have more training about what that gray area was would have been a help.

There was also very marked differences and sometimes just complete errors among high-ranking individuals in the Orleans Parish District Attorney's Office as to what *Brady* required them to do.

For example, if you recall, Mr. Connick was testifying about one of the police reports that gave the description of the perpetrator as 6 feet tall, dark complected and close-cropped black hair. And then he was, in the deposition, was shown the mug shot picture of John Thompson with the Afro. Mr. Connick looked at that and immediately concluded that that police report giving a different description than the picture would be *Brady* and should be turned over.

If you recall, and I recall very clearly, Mr. Dubelier being asked the same question, and he looked at the picture and considered the contents of the report. Again, 6 feet tall, close-cropped hair, dark complected, African-American male, and didn't think that there was any inconsistency in appearance, and basically did a dance and hypothecated a scenario where, well, maybe the picture didn't exactly represent the way the individual looked, so in his mind, Mr. Dubelier didn't believe that that was [p.435] *Brady*.

So here you have the number 1 guy in the office saying, yes, it's *Brady*, then you have the number 2 person in the office, and quite frankly it shocked me, saying that it wasn't *Brady*.

We then have the testimony of Mr. Williams yesterday who testified that if he had had the blood report, that the blood report should be turned over.

And I believe we just had, I think it was Mr. Solino, the testimony where Mr. Banks was reading it, testifying that if they had the blood report but he didn't necessarily know the blood type of the perpetrator that that wouldn't be required to be turned over as *Brady* material.

Q. So is it your conclusion from that testimony that A, prosecutors didn't understand *Brady*, and B, that reflected on the quality of the training?

A. Absolutely.

Q. Does the ABA standard, Mr. Lawless, also address the issue of providing guidance to assistant district attorneys through a handbook given by a district attorney to assistants?

A. Yes, it does.

MR. COONEY: Mr. Vincent, would you be good enough to put up section 3-2.5. I think actually, that's another.

THE WITNESS: Mr. Cooney, would you like to use my copy of the report?

EXAMINATION

[p.436] BY MR. COONEY:

Q. Well, would you refer to your copy of the report, Mr. Lawless?

A. Certainly.

Q. And I'm directing your attention to page --

A. 29?

Q. 29 of your report. Can you explain to the jury about section 3-2.5 of the ABA standards with regard to the prosecutor's handbook?

A. Yes. What the standard says, and excuse me for reading, it says that, "Each prosecutor's office should develop a statement of general policies to guide the exercise of prosecutorial discretion and procedures of the office. The objectives of these policies, as to discretion and procedures, should be to achieve a fair, efficient and effective enforcement of the criminal law."

And then standard 3-2.5(B) states, "In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public except for subject matters declared confidential when it is reasonably believed that public access to their contents would adversely affect the prosecution function."

The commentary to that, which is in an explanatory section that follows the standard says, regarding an office handbook, "The articulation of policies and procedures should be preserved in a handbook or manual that reflects current rules, [p.437] statutes

and judicial decisions. It should also contain detailed descriptions of the criteria governing the principal duties of the office. Highly useful manuals have been established in many prosecutors' offices. They serve to maintain consistent practices and continuity despite changing personnel and tend to assure that the policies adopted at the highest levels of the office are observed by the staff. Perhaps of equal importance is the function of such a handbook as a teaching tool by which the accumulated experience of many is preserved and transmitted."

Q. Now, Mr. Lawless, am I correct that that standard was articulated by the American Bar Association in about 1980?

A. Well, I believe it was first articulated in 1974, and then it was reiterated in 1980. I don't believe that changed at all from the first to the second set.

Q. At the time of the prosecutions against Mr. Thompson in 1985, did the Orleans Parish District Attorney's Office have a handbook?

A. No, it did not.

Q. What was the first year that the Orleans Parish District Attorney's Office had a handbook?

A. My understanding is the first year they had a handbook was 1987, which would have been two years after Mr. Thompson's trials.

MR. COONEY: And Mr. Vincent, can you now put up section 5.25.

[p.438] EXAMINATION

BY MR. COONEY:

Q. This is the section of the Orleans Parish District Attorney handbook, Exhibit 51, from 1987. Have you reviewed that section, Mr. Lawless?

A. Yes, I have.

Q. Now, does that section provide any guidance to prosecutors as to what is and is not *Brady* material?

A. No. It just says that the duty to produce it is ongoing. It doesn't give any guidance at all as to what it is or what has to be produced.

Q. And it says in most cases in response to the request of the defense attorneys, and it's talking about the, in response to a request as opposed to an initiation?

A. Correct.

Q. By the DA?

A. That's correct.

Q. The judge orders the state to produce so-called *Brady* material. "That is information in the possession of the state which is exculpatory regarding a defendant."

Do you see that?

A. Yes.

Q. Let me ask you a couple of questions about that. Is *Brady* limited to situations where there is A, a request from the defense, and B, the judge orders the prosecutors to turn over the [p.439] information?

A. No, it isn't.

Q. And is *Brady* limited, Mr. Lawless, to information which is simply exculpatory regarding a defendant?

A. No.

Q. Is it allowed to include impeachment evidence?

A. It was expanded shortly thereafter in a case called *United States v Giglio*, which says that *Brady* material is not only evidence that tends to show a defendant is innocent, exculpatory, but evidence which impeaches the credibility of witnesses who are testifying against the defendant.

Q. In the *Giglio* case, what year was *Giglio* decided?

A. I believe it was within four to five -- it might even have been within two to three years after *Brady*, but it was very shortly thereafter.

Q. Would 1972 refresh your recollection?

A. Yeah, it would. Thank you. I didn't memorize the year.

Q. Then it goes on to say, "The duty to produce *Brady* material is ongoing and continues throughout the entirety of the trial. Failure to produce *Brady* material

has resulted in mistrials and reversals as well as extended court battles over jeopardy issues."

Does it say anything in that policy about the impact on the Defendant of failing to produce *Brady* material?

A. No, it does not.

[p.440] Q. It then goes on to say, "In all cases, a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pretrial conference and each assistant must be familiar with the law regarding exculpatory information possessed by the state."

Is that what that says?

A. That's what it says.

Q. So it tells the DAs they have to go out and figure it out?

A. Yes.

Q. Based on your experience, Mr. Lawless, did the 1987 handbook give proper guidance to the assistant district attorneys in the Orleans Parish District Attorney's Office?

A. No, it did not.

MR. COONEY: I have no further questions, Mr. Lawless. Thank you.

THE COURT: All right. Mr. Aaron.

CROSS-EXAMINATION

BY MR. AARON:

Q. You said a lot in a short time. Open-file discovery. You mentioned benefits. Are there any downsides to it?

A. Well, I believe you had mentioned it in your opening statement, Mr. Aaron. One of the arguments that's frequently made against open-file discovery are supposed threats or concern for witnesses' safety.

As a practical matter, however, in 1975, when the House [p.441] Judiciary Committee was examining expanding the federal rules of criminal procedure, they accepted testimony and concluded that in practice, that wasn't as broad a problem as is perceived and that in the isolated cases where that was an issue, there were steps that could be taken to ensure there wasn't witness retaliation by redacting statements or editing out that kind of information. It's an argument, but it's not as broadly perceived as thought.

* * *

[p.456] MR. AARON: It was --

THE COURT: No, no, we're not going there.

MR. AARON: I didn't think you would let me go there.

THE COURT: No, that's ridiculous. Absolutely not.

MR. AARON: Actually it was not. I handled the Cousins case.

THE COURT: It's over.

MR. AARON: Fine, Judge.

(WHEREUPON, the bench conference concluded.)

EXAMINATION

BY MR. AARON:

Q. Mr. Lawless, you're being compensated, I mean by that you're being paid for your testimony here today?

A. I'm being paid for my time, yes, sir.

Q. And how much are you being paid?

A. I'm being paid at an hourly rate of $350 an hour.

MR. AARON: No further questions, Your Honor.

THE COURT: All right. Any redirect?

MR. COONEY: A limited redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. COONEY:

Q. Mr. Lawless, what rate do you charge your clients with regard to your legal practice?

A. $525 an hour.

Q. If the blood evidence in this case, the crime lab report, [p.457] had been given to John Thompson's

lawyers, would there have been anybody endangered by that?

A. No.

Q. If the information in the police reports setting forth the hair length had been disclosed, would anybody have been endangered by that?

A. No.

Q. Mr. Schliffka had been identified to the defense, correct?

A. Yes.

Q. In your opinion, Mr. Lawless, if the assistant district attorneys in the Orleans Parish District Attorney's Office simply followed the rule of professional conduct that Mr. Aaron showed you, referring only to exculpatory evidence, would they know from reading that to produce impeachment evidence?

A. No.

Q. And under your, in your opinion, is impeachment evidence required to be produced under the *Brady* documents?

A. Not just my opinion, Mr. Cooney, under the United States Supreme Court precedents it absolutely is.

Q. Mr. Aaron asked you some questions about whether you talked to any district attorneys from the Orleans

Parish District Attorney's Office. Did you review Mr. Williams' deposition in the case?

A. Yes.

Q. Did you listen to him testify at trial?

[p.458] A. Yes.

Q. Did you review Mr. Whittaker's deposition in the case?

A. Yes.

Q. Did you listen to him testify in the trial?

A. Yes.

Q. Did you review Mr. Dubelier's deposition in this case?

A. Yes.

Q. Did you review Mr. Connick's deposition in this case?

A. Yes.

Q. Do you review Mr. Solino's deposition in the case?

A. Yes.

Q. Did you review Mr. McElroy's deposition in this case?

A. Yes, I did.

Q. Would you agree with me that if you are a District Attorney and you're relying on a system of supervision, your supervisors have to understand *Brady*?

A. Mr. Cooney, there is an expression, the blind leading the blind. Yes, the supervisors have to understand *Brady* or it makes no sense to go to a supervisor and ask a *Brady* question.

Q. Based on what you've seen in this case, did Mr. Dubelier understand the *Brady* obligation?

A. Mr. Cooney, I was absolutely shocked at Mr. Dubelier's response. Mr. Dubelier had no understanding of his obligations under *Brady* whatsoever.

Q. Mr. Lawless, did Mr. Williams -- did you listen to [p.459] Mr. Williams testify?

A. Yes.

Q. Did he have an understanding of his obligations under *Brady*?

A. I don't believe he did, no.

Q. Did Mr. Whittaker have a full understanding of obligations under *Brady*?

A. No. The only thing Mr. Whittaker really had an understanding of is that he didn't have enough training in the first place and he would have found it helpful.

Q. Under *Brady* and under federal law, Mr. Lawless, can a District Attorney's Office avoid compliance with *Brady* and federal law simply by following the state rules of procedure?

A. No.

Q. Why is that?

A. Because as I said, under the Supremacy Clause, the U.S. Constitution and the cases that interpret the Constitution interpose a greater obligation. The state rules in Louisiana, at least as I read them, provided a minimal amount of disclosure. But every prosecutor in every country in America -- every city in America is obligated to follow the U.S. Constitution. I mean, it's basic.

MR. COONEY: Thank you, Mr. Lawless.

THE COURT: All right. You can step down, sir.

THE WITNESS: Thank you, Your Honor.

(WHEREUPON, the witness was excused.)

* * *

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX, Volume 2

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[caption omitted in printing]

WEDNESDAY, FEBRUARY 7, 2007, 8:30 A.M.
VOLUME III
TRANSCRIPT OF TRIAL PROCEEDINGS
HEARD BEFORE THE
HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

* * *

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* * *

[p.493] MR. BANKS: The plaintiff calls Eric Dubelier, Your Honor.

THE COURT: All right.

THE DEPUTY CLERK: Raise your right hand.

ERIC DUBELIER

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: Good morning, Your Honor. My name is Eric Dubelier. My first name is spelled E-R-I-C, last name D-U-B-E-L-I-E-R.

CROSS-EXAMINATION

BY MR. COONEY:

Q. Good morning, Mr. Dubelier.

A. Good morning, sir.

MR. COONEY: Your Honor, may I approach and hand Mr. Dubelier a binder?

THE COURT: Yes.

EXAMINATION

BY MR. COONEY:

Q. Mr. Dubelier, I'm going to hand you a binder of some of the documents that we're going to refer to in your examination.

A. Thank you, sir.

Q. Now, Mr. Dubelier, am I correct that you were an assistant district attorney in the Orleans Parish District Attorney's Office in 1984 and 1985?

[p.494] A. Yes, sir, I was.

Q. And you were the chief of screening at that time; is that right?

A. I think I became the chief of screening in 1984. I think.

Q. And as the chief of screening, would you agree with me that you occupied essentially the third-highest office, highest position in the office?

A. Well, there was the District Attorney, there was the first assistant district attorney, and then there were the division chiefs. I was one of multiple division chiefs.

Q. And there were a small number of division chiefs; is that right?

A. My recollection is trial, screening, appeals, nonsupport. I think maybe there were two chiefs of trials. So there were probably five, five of us.

Q. Mr. Dubelier, you graduated from law school in 1981; is that right?

A. Yes, sir, I did.

Q. And so when you were made the chief of screening, you were less than four years out of law school; am I right?

A. I think that's right, yes, sir.

Q. And you went straight from law school to the District Attorney's Office?

A. Yes, sir, I did.

Q. And am I correct, Mr. Dubelier, you were one of the [p.495] prosecutors who tried John Thompson for the first-degree murder of Ray Liuzza?

A. Yes, sir, I did.

Q. And you were the lead prosecutor on that case; am I right?

A. Yes, sir, I was.

Q. And Mr. Williams was your co-counsel in that case?

A. Yes, he was.

Q. And for some period of time, you were also the lead prosecutor on the armed robbery prosecution against John Thompson; am I right about that?

A. Sir, I know you've asked me about this before. I do not remember the answer to that question.

Q. You don't remember that?

A. No.

Q. Mr. Dubelier, I would ask you to take a look, if you would, please, at Exhibit --

A. Is it 33?

Q. -- 42.

A. 42. Okay.

Q. Do you recognize that as -- I'm sorry, that's not the exhibit I'm looking for. Bear with me for one second.

A. If you're looking for the Screening Action Form, I think it's 33.

Q. Well, that's one of the documents I'm looking for. Let's look at that one for a second. Let's look at 33.

* * *

[p.502] Q. And would this also refresh your recollection that you were working on the investigation of the Mr. Liuzza murder before John Thompson and Kevin Freeman were arrested?

A. Sir, it doesn't refresh my recollection; however, I don't deny it. This is 22 years ago. I don't remember it, but I have no reason to argue about the language of this report.

Q. Would you agree with me that the prosecution of the armed robbery case was part of the murder case prosecution strategy?

A. Yes.

Q. And I would ask Mr. Vincent, please, to display Exhibit 37. And, Mr. Dubelier, if you would take a look at Exhibit 37 in your book.

A. Yes, sir.

Q. Do you recognize that as a motion for continuance that you filed in the John Thompson murder case?

A. Yes. And again, I have no recollection of filing it, but it's my signature on it and it's Bates-stamped as filed so I have no reason to dispute what it is.

Q. Am I correct that one of the reasons why you filed this motion in the court was that if you could try Mr. Thompson for armed robbery first and get a conviction, it would be harder for Mr. Thompson to testify and defend himself in the murder case?

A. I think there were probably two components to it. Yes to that and also, it would probably impact the sentencing phase of the trial, is my recollection of what our thinking was.

[p.503] Q. So that from your perspective, the two purposes were to make it harder for Mr. Thompson to testify in his defense and, secondly, because that could be used by you in the penalty phase of the murder case?

A. Well, again, I wouldn't characterize it in that way and I would also say this was not unique to the Thompson case, and that is, it was standard practice in the office if we had a capital murder case and there were other charges also pending, we would try those other charges first.

Q. But the two objectives that you were trying to achieve, number one, make it harder for Mr. Thompson to testify in his own defense and, number two, to have an additional argument you could make in favor of the death penalty; correct?

A. The objectives were to make the case as strong as we possibly could from the perspective of the State so the answer would be yes.

Q. Mr. Dubelier, I'm going to ask Mr. Vincent to put on the screen the Screening Action Form which is Exhibit 33. We talked about that a minute ago.

A. Yes, sir, I have it.

Q. And I take it you have seen this document before?

A. I think I saw this document in 1999. I think I saw it again in 2005. And I saw it again the other day.

Q. And do you recognize the document as a Screening Action Form?

* * *

[p.508] the Liuzza weapon. Does that raise any question in your mind as to whether or not the District Attorney's Office or the police had the gun?

A. Yes. Did we have the gun in the armed robbery?

Q. That raises a question in your mind as to whether the State of Louisiana had in its possession the gun?

A. Yes. Didn't we have it, sir?

Q. The second paragraph or second sentence there, Mr. Dubelier, says, "Victim made photo ID. Will be down 3/11/85 if physical desired. May wish to do blood tests." Do you see that?

A. Yes.

Q. And did that indicate to you, would that indicate to you that there was some blood evidence issue in the case?

A. Yes.

Q. Good. So if you had gotten this document back in 1985 in the ordinary course of things, that would have indicated to you that there may be some blood evidence in the case?

A. That's what I just said.

Q. Good. And would you agree with me that in the armed robbery case, blood evidence either would have helped your case, if the blood type was consistent with Mr. Thompson's blood type or it could show that Mr. Thompson was not the perpetrator if the blood types didn't match?

A. I don't know from that form whose blood we had.

Q. Do you have any recollection of talking to Mr. Whittaker [p.509] about this issue?

A. No.

Q. You don't. Do you have a recollection of ever talking to Mr. Whittaker about the blood issue?

A. I don't know. I may have. I may not have. I don't know.

Q. You can't recall?

A. There is no way I can recall. It's 22 or 23 years ago.

Q. Mr. Dubelier, I think at some point you've said that at some point before the armed robbery trial you handed it off to Mr. Williams; is that right?

A. If those were the words I used. I know Mr. Williams tried the case. I know that.

Q. Did you hand the case off to Mr. Williams at some point prior to the trial?

A. Yes.

Q. Okay. What's your best recollection as to when you handed it off to Mr. Williams?

A. I have no recollection of that.

* * *

[p.520]

* * *

Q. And, Mr. Vincent, could you put up Exhibit 45, please.

A. Is this in the binder, sir?

Q. It is. Mr. Dubelier, would you agree that this is a copy of [p.521] a crime laboratory report dated April 9, 1985?

A. Yes, sir, I would.

Q. And am I also correct that you can't say today whether or not you saw that report in 1985?

A. That's correct.

Q. Now --

A. You know, let me go back a second. If this report was not turned over, I didn't see it.

Q. How can you make a statement like that, Mr. Dubelier?

A. Because I would have turned it over if I had it.

Q. So that the only basis that you have for saying that you didn't see it was because if you would have seen it, you would have turned it over?

A. That's correct.

Q. You're as sure of that as the day is long?

A. Yes, I am.

Q. Mr. Vincent, can you please play Pages 27, Lines 21 to Page 29, Line 6 of Mr. Dubelier's deposition?

(WHEREUPON, the video is played at this time as follows:)

"QUESTION: Mr. Dubelier, we're placing before you what's been marked as Dubelier Exhibit Number 1, which is a copy of an April 9, 1985 report of the

crime laboratory addressed to the District Attorney's Office, Attention ADA Bruce Whittaker. Do you recognize this document?

[p.522] "ANSWER: Is this the report that Mr. Glas showed to me in 1999?

"QUESTION: At the hearing, that's correct.

"ANSWER: I recognize it from Mr. Glas having shown it to me then in 1999, based on you telling me that this is the same one. I don't remember seeing all the pages of this. I thought he showed me -- I don't remember. Maybe he did show me all four pages. I don't remember.

"QUESTION: Prior to 1999, had you ever seen this document before?

"ANSWER: I have no recollection of ever having seen this document prior to 1999.

"QUESTION: Are you saying that you didn't see it before or you can't recall one way or the other whether you had seen it before?

"ANSWER: There's no way I would be able to recall whether or not I had seen this Document 20 years ago."

(WHEREUPON, the video testimony is concluded.)

EXAMINATION

BY MR. COONEY:

Q. And, Mr. Dubelier, that was your testimony at the deposition; am I right?

A. But, again, I gave more testimony, sir. It goes on. I kept talking about this same issue. And what I'm telling you today, my testimony today is, I do not remember whether or not I ever [p.523] saw that document. But I prosecuted thousands of case when I was a DA and turned over thousands of these type of reports. If I had the report, I would have turned it over. That's the best I can do.

Q. And you're saying that because if you didn't turn it over, that would be a violation of the defendant's rights; is that right?

A. The crime lab report, we were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office. There are, again, records, I am sure, in the office of hundreds, if maybe not more cases where I turned over these type of reports. So my practice would have been to turn over the report.

Q. But sitting here today, you can't say whether or not you did that with regard to that report; am I right?

A. No, I cannot, because I don't know whether I ever saw the report.

Q. Now, Mr. Dubelier, Mr. Thompson was convicted of attempted armed robbery; am I right?

A. Yes, he was.

Q. And he didn't testify in the 1985 murder trial; am I right about that, also?

A. That's correct.

Q. So –

A. Now, could I ask you, again, I don't mean to be difficult, I [p.524] know he didn't testify in the trial in chief. I don't remember whether he testified in the penalty hearing. If you say he didn't, he didn't.

Q. So that you accomplished the first objective with regard to the armed robbery case; right?

A. His lawyer determined not to put him on, and I believe he did not put him on because he had an armed robbery conviction. There may have been other factors as well.

Q. And do you recall that Mr. Williams examined Marie LaGarde during the penalty phase of the murder case?

A. You've asked me that before. I don't have a recollection of it, but if the record of the trial reflects that's what occurred, I'm not going to take issue with it.

Q. And would you agree with me that you used the armed robbery conviction to argue that John Thompson should die?

A. If the record reflects that's what I did, that's what I did.

Q. Let's do that. Let's pull out -- let's show the jury what you argued at the penalty phase. And, Mr. Vincent, if you would be good enough to bring up Page 453, starting at Line 13. Can you bring that up in a little bit larger size? Mr. Dubelier, for your convenience, if you look at Exhibit 137 of your --

A. Yes, sir, I have it.

MR. COONEY: Can you make that any bigger, James?

THE COURT: Which exhibit are you on?

MR. COONEY: This is Exhibit 137, Your Honor.

[p.525] THE COURT: I heard you say 453.

MR. COONEY: Page 453 of Exhibit 137.

THE COURT: That says Page 454. Are you on the right page?

MR. COONEY: 451. I apologize, Your Honor. May I approach, Your Honor?

THE COURT: Yes.

EXAMINATION

BY MR. COONEY:

Q. Would you agree with me, Mr. Dubelier, that you made the following argument to the jury: "Consider the testimony of Mary LaGarde. It's important because if anything goes to the character of that man, it's the testimony of Mary LaGarde. Based on her testimony but for a split second, would there be three more murder victims? Would this be his second murder trial? I think so, because Mr. Thompson has a little signature he uses, .357 Magnum. That's his signature. This one almost killed three kids. This one killed one man. That's how he signs when he leaves somewhere. That's John Thompson. Now, I'll tell you folks, you're going to consider the circumstances and his personality. This is his personality. You don't have to hear from any highfalutin sociologist to figure out all about John Thompson. Look at these. Look at these. He likes them and he kills with them. Think about these when you go back to determine what you want to do with him. What does he consider [p.526] the value of life? I think it's important when you go back to consider what the penalty should be, how does he value life?" Is that the argument that you made to the jury?

A. That among a lot of other things, yes.

Q. And would you agree with me that you made big use here of the fact that the gun was the same make and model as used in the Liuzza case?

A. I stated that, yes.

Q. You wanted to have the jury vote to kill John Thompson based in part on that; correct?

A. No, sir. My obligation was to prosecute the case. The policy of the office in first-degree murder cases was if it was a first-degree murder case, we pursued the death penalty. It was not discretionary. That was the policy. Did I personally want the jury to find John Thompson guilty? That wasn't my role. My role was to represent the people of the State of Louisiana, present the evidence, and have them reach a determination. This was not personal. It wasn't then and it isn't now.

Q. You were trying to convince the jury to vote in favor of killing John Thompson based on that argument; correct?

A. In my role as an assistant United States attorney, yes, I was advocating that on behalf of the people of the State of Louisiana and that was my responsibility.

Q. Let's look a little bit further on what you argued, a little further down starting on Page 53, 453, Line 13.

[p.527] A. Could you hang on a second?

Q. Are you there, Page 453, Line 13?

A. I want to make sure you stopped and you're skipping where I had the actual evidence of the murder case.

Q. I'm focusing on, Mr. Dubelier, the evidence that you used from the armed robbery conviction.

A. That's fine. Where are you?

Q. Page 453, Line 13. Did you further argue, "You know, folks, the evidence is in pertaining to his prior

conviction of attempted armed robbery and the sentence is in the record. He is currently serving a sentence of 49 and a half years without the benefit of parole, without the benefit of probation, without the benefit of suspension of sentence. What does that mean to someone who is 22 years old? That's life. That's life. He can't get out. And now he stands trial for murder. And what are you going to do? You're going to say, okay, we'll give you one more life. We'll put another life sentence on top of the one you already have. Do you know what that means? That means he wins. He wins. He walks out of this courtroom and he laughs, and he says, 'Ha, ha, they put me through all that. They put me through three days of trial. They found me guilty of killing that man. I killed the man, and they didn't do anything to me. I already had the 49 and a half years. I'm going to jail for the rest of my life. Ha, the joke is on them. They didn't do anything to me. They can't hurt me, even though I killed that man.' That's [p.528] a dangerous message to send, folks, to anyone, especially someone like that, to let him get away with something like this."

Is that the argument you gave to the jury back in 1985?

A. Yes, sir, it is.

Q. You didn't actually believe that John Thompson would have thought it was funny to receive a life sentence, did you?

A. I have no idea what he would have thought.

Q. Now, in big cases, Mr. Dubelier, like the Liuzza case, you did your homework?

A. Of course.

Q. You prepared for the trial?

A. Yes.

Q. Important for you to know the facts?

A Yes.

Q. Had to know what the witnesses would say on the stand; right?

A. Yes, as best we could.

Q. Wanted to know what the physical evidence would be?

A. Yes.

Q. Wanted to review witness statements?

A. Yes.

Q. Wanted to read the police reports?

A. Yes.

Q. And in the Liuzza murder case, we already looked at a document. You were even talking to the police about the [p.529] circumstances of the Liuzza murder even before Mr. Thompson's arrest; am I right?

A. Yes.

Q. And before you put a witness on the stand, you would prepare that witness, right, typically?

A. As best we could.

Q. And that means you would meet with the witness that you were calling to testify in your case and you would want to go over in advance what that witness was going to say; am I right?

A. All I can tell you is to the best of my recollection there were many cases that I prosecuted, probably this one as well, where the first time I met the witness was in the hallway right before they testified and it was just by virtue of the volume of work we had.

Q. But in a high-profile case in particular, you would want to make sure that you had met in advance and prepared the witnesses; am I right?

A. I may have done that, I may not have. Again, I don't know.

Q. In the ideal world, that's something you do; am I right?

A. The DA's office in 1985 was not the ideal world.

Q. If you had the opportunity to do it, you would meet with the witnesses in advance; am I right?

A. Yes.

Q. Because your preparation for trial would be better if you did that.

[p.530] A. Yes.

Q. And you wanted to make sure that you could minimize any surprise at trial. That's one of the things you wanted to do.

A. Correct.

Q. Okay. Would you agree with me that as a general matter, the police try to get a complete description of the perpetrator from eyewitnesses at the time of the crime?

A. Theoretically, that's correct. In my practice, I've not found that to be literally correct.

Q. But that at least as a goal, what the police want to try to do when they come to a crime scene is get a description of a perpetrator if they can?

A. That's what they are trained to do.

Q. And what they want to try to do is get the most complete description they possibly can at the scene; am I right?

A. That's what they are trained to do.

Q. And part of that's because their recollection of what they just saw is freshest right then and there than it might be, say, six months later?

A. Yes.

Q. I would like to have you refer, if you would, Mr. Dubelier, to Exhibit 30. Mr. Vincent, if you could pull

up Exhibit 30. Do you recognize this, Mr. Dubelier, as a supplemental police report for the Thompson or the Liuzza murder?

A. I recognize this as a report I think that you showed me in [p.531] 2005, and it appears from the face of it that it is -- is it marked supplemental at top?

Q. It says incident report supplemental report.

A. Yes, I don't know what it is because incident and supplemental, something should be checked there, I would imagine, so I don't know what it is.

Q. Would you agree with me -- if you look at the length of the document, would you agree with me that based on the length of this document that it's a supplemental report?

A. I don't know that I'd call it a supplemental report. What I'd call it is the Homicide Division's report, their final report on this investigation. That's what I would call it.

Q. And I ask you to turn to Page 12 of the report, if you would, and, Mr. Vincent, if you could pull up Page 12. It says Page 12 of 35. And would you agree with me that the final paragraph on Page 12 talks about a description provided by a witness by the name of Paul Schliffka?

A. Yes, sir, it does.

Q. And, Mr. Vincent, would you be good enough to highlight the section of that paragraph that talks about the witness' description?

Would you agree with me that at least what's in this police report about the description given by Paul Schliffka was that the perpetrator was a Negro male, early 20s, 6 feet tall, slim build, dark complexion, close-cut hair, wearing a black [p.532] nylon jacket and dark pants, possibly blue jeans?

A. Yes, sir.

Q. The hair is described as close-cut?

A. Yes.

Q. Do you see anything in that paragraph relating to Mr. Schliffka's description of the perpetrator that uses the word "Afro"?

A. No.

Q. And I take it you don't have any recollection that you produced that document in the Thompson case, do you?

A. No. You asked me about this before, and what I've said before and I'll say again the is final homicide report. We may or may not have had this report at the time the case was tried. If there was a date on this report, it would answer that question. I don't know the answer to the question. I can tell you in practice, though, that it was not unusual for us to try a homicide case and not have the final homicide report.

Q. Mr. Dubelier, I don't think that was responsive to my question. My question was you don't a recollection of having produced this to the defense in the Thompson case, do you?

A. I don't have a recollection of ever having it to produce, so no, I don't have a recollection of producing it to the defense.

Q. I would ask you to look at the last page of this document, if you would, Mr. Dubelier.

A. Yes, sir.

[p.533] Q. On the last page of the document -- and would you agree with me that what the document does is it goes through a long narrative concerning the investigation of the Mr. Liuzza murder case?

A. Without reading it page by page, I will take your word for it that that's what it does.

Q. On the last page, what it says is "On Thursday, January 17, 1985, John Thompson and Kevin Freeman were indicted by an Orleans Parish Grand Jury for the first-degree murder of Ray T. Liuzza. Charges against the pair are still pending in Criminal District Court, the Parish of Orleans. With the arrest of John Thompson and Kevin Freeman, this case is now considered solved and cleared. Any additional information developed relating to this investigation will be submitted in an additional supplemental report. Office of the Honorable District Attorney to be consulted in this matter. Bulletin sent."

Does this give you any information that this report was prepared around the time that the police had referred this matter to the District Attorney's Office?

A. No.

Q. That doesn't do that for you?

A. No.

Q. I would like to draw your attention to Exhibit 5, please.

A. Yes, sir.

Q. Do you recognize that as a New Orleans Police Department [p.534] daily report?

A. Is that -- does it say that somewhere because I don't know what that is.

Q. Is it a Criminal Investigation Bureau daily report?

A. It's a Criminal Investigations Bureau report. You're using the phrase "daily," I don't know what that means.

Q. Do you have an understanding that as the --

A. Oh, I see on Page 2 it says daily.

Q. And was the phrase "daily" familiar to you as an assistant district attorney in Orleans Parish?

A. No.

Q. It wasn't familiar to you?

A. No.

Q. Now, would you agree that the date of this document is December 8, 1984?

A. Correct. Yes.

Q. And the -- there is also a discussion here about an interview of Mr. Schliffka?

A. Correct. There is.

Q. And if we look at the last paragraph on the first page, Mr. Vincent, if you could highlight that. What we have in this document is "Upon looking towards Josephine Street, Mr. Schliffka observed a black male, early 20s, 6 feet tall, slim build, dark complexion, short hair, wearing a black nylon jacket and dark colored pants running across Baronne Street on Josephine Street [p.535] towards Dryades." Do you see that?

A. Yes.

Q. Do you see any discussion in this paragraph concerning Mr. Schliffka's description of the perpetrator that uses the word "Afro"?

A. No.

Q. And I take it you don't have any recollection of having produced this document to the defense; am I right?

A. I don't know if I ever saw it, no. I have no recollection.

Q. Okay. Let's go to Exhibit 2, if we can. Do you recognize Exhibit 2 as a Criminal Investigation Bureau report?

A. That's what it says it is, yes.

Q. And again, this is for the Liuzza murder; am I right?

A. Yes.

Q. I would like you to turn, if you would, to Page 2.

A. Yes, sir.

Q. If you would look at the bottom paragraph on Page 2, am I correct that what's discussed here is an interview with Mr. Schliffka?

A. Correct.

Q. And the people that were conducting the interview were Officers Angelo and Carter?

A. That's what this says, yes, sir.

Q. And this was prepared on December 6th; am I right?

A. I don't know. It says the offense date is December 6th. I [p.536] don't know when the report was prepared.

Q. If you look at the bottom right-hand corner of the first page.

A. Yes.

Q. And so December 6th was the day of the murder?

A. Was it?

Q. If there is a stipulation that December 6, '84 is the day of the murder, you don't have any reason to quarrel with that?

A. No, sir, I absolutely do not.

Q. So this report would have been prepared the day of the murder? Based on what you see in this document?

A. I guess so. I mean, you would have to ask the police officers. I don't know for certain. I'm sorry.

Q. So going back to Page 2, what we have is Officers Angelo and Carter interviewing Mr. Schliffka; am I right?

A. Yes, that's what he makes reference to. I don't know -- it doesn't appear that they, that Angelo and Carter wrote this. It appears that the detectives talked to Angelo and Carter and then wrote down what Angelo and Carter told them Schliffka had said. That's what it appears to me to be.

Q. So it says Schliffka told Officers Angelo and Carter that "At approximately 12:40 a.m. he was getting into his vehicle which was parked in front of his residence at 2026 Baronne Street when he heard what sounded like several gunshots being fired around the corner on Josephine Street. Upon looking up, [p.537] Mr. Schliffka observed an unknown Negro male, previously described, running on Josephine across Baronne Street in the direction of Dryades. As the wanted subject ran across Baronne Street, he still clenched a dark colored revolver in his right hand. Mr. Schliffka ran to the corner of Baronne and Josephine and watched the

wanted subject as he fled up Josephine to Dryades Street and then unknown." You see that?

A. Yes, sir.

Q. And when it makes reference to previously described, am I correct that on Page 1 of this document, there is the description of who Mr. -- of what Mr. Schliffka saw?

A. Yes, sir, there is.

Q. And let's look at the wanted subject box. And this is, again, based on what Schliffka told Angelo and Carter?

A. Yes, sir.

Q. Unknown Negro male, 6 feet tall, black jacket, blue jeans, close-cut hair, armed with a blue steel revolver, possibly with a 4-inch barrel.

A. Yes, that's correct.

Q. That's what it says?

A. Yes.

Q. No reference to an Afro in this document, either?

A. No, sir.

Q. And you don't have any recollection of having produced this to the defense; am I right?

[p.538] A. I have no recollection of ever having had this nor producing it to the defense.

Q. But you can't say today whether you did or didn't have it; am I right? Twenty years ago, just like everything else, can you remember that you had this document, Mr. Dubelier?

A. No. What I'm trying to say is that my -- to the best of my recollection, generally, not in this case, but when we tried homicide cases, we would have the incident report from the police, we would have crime lab reports. I don't remember as a standard practice getting this kind of stuff. This is the kind of thing that would have been in the Police Department homicide file that we would not necessarily have gotten. That's the best I can tell you. Did I get it in this case? I don't know the answer to that. I'm sorry, I can't do any better than that.

Q. And certainly nobody would have stopped you from getting that from the police files; right?

A. The police did not give us acces to their file.

Q. Is it your testimony that --

A. That's not their practice.

Q. -- the police would exclude you from looking at those documents?

A. I can never recall once ever in my five and a half years here going to the Homicide Bureau and going through the homicide file. They would send us

material and we would rely on the material they sent us. All I can tell you is that was the [p.539] practice.

Q. Did you ever try to review the information in the possession of the police?

A. Ever in any case?

Q. Yes.

A. I don't know.

Q. Now, I thought you earlier said that the police reports would be useful to you? You would want to know what witnesses told the police; right?

A. Yes, sir, but there were, we would get things like the incident report from the arresting officers, we might get a witness statement, a copy of a witness statement with a Q & A in it. But my -- to the best of my recollection, and again, it's a long time ago, the final homicide reports, this is in a day and age before computers. The homicide detectives were typing with two fingers on typewriters and so this stuff took a long time to get to us and there were many cases where we didn't get it until after the case was already prosecuted. Whether we got it in this case or not, I do not know the answer to that. I'm not going to testify that we got it. I'm not going to testify we didn't get it. I don't know. I'm sorry.

Q. Mr. Dubelier, there is a stipulation in this case, among all the parties, "Defendants Dubelier and Williams were involved in reviewing the police reports and evidence, preparing the murder case against Mr. Thompson for trial, handling pretrial discovery [p.540]

and pretrial motions, interviewing witnesses and presenting the case on behalf of the State of Louisiana against Mr. Thompson at trial." Do you have any reason to quarrel with that?

A. No, I don't, because that does not specifically say what reports I had and I reviewed and I don't know the answer to it, I'm sorry. I can't help you.

Q. And I want to make sure I'm clear on something. Are you saying that the police resisted your efforts or made it difficult for you to review any of the material in their possession?

A. What I'm saying is that my recollection, my best recollection of the policy was, we did not have access to the Homicide Division file. They would send us the materials they were going to send us and that's the way the system worked. That's my best recollection 22 or 23 years later.

Q. I would like to show you Exhibit 34, please.

THE COURT: Wait a minute. Wait a minute. I want to clarify something.

THE WITNESS: Yes, sir.

THE COURT: Mr. Dubelier, are you saying that in 1985, the District Attorney's Office did not get the police reports on a homicide investigation? I'm trying to understand what you're saying.

THE WITNESS: What I'm saying, Your Honor, is the report I'm being shown here looks to me to be the

final report of the Homicide Division. It's a long report. It's about 30 pages [p.541] long. There were no --

THE COURT: Is there a date on that report?

MR. COONEY: There are three reports. There's a report that's dated December 6th, there's a report that's the date of the murder, there is a report that's dated December 8th and there is an undated report which at least sounds like it was prepared on or around January 17th. There are three documents that we're talking about prepared at different dates, one of which was the night of the murder.

THE WITNESS: Your Honor, what I want to clear up is that on this undated report, this appears to be the final report of the Homicide Division. It contains the entire investigation and all the information they gathered up. To the best of my recollection, it was not uncommon that we would not have this final report. Often at the time we tried the case. And the reason was that there were no word processors. The detectives were typing this stuff on typewriters and it could take them months and months to get us this final report.

THE COURT: But you're not -- I'm just trying to understand. I'm sure the jury would like to know. You certainly had access to whatever information the police had? You could go talk to them, you could talk to the detectives; right?

THE WITNESS: Absolutely. It was the obligation of the police, their affirmative obligation to give us the evidence relating to the case. I'm not suggesting in any way nor do I [p.542] want to suggest that they purposefully would have withheld something from us.

THE COURT: I'm sorry. Go ahead.

THE WITNESS: I'm sorry I wasn't clear on that, Your Honor.

EXAMINATION

BY MR. COONEY:

Q. Mr. Dubelier, you could have looked at what was in the police's file when you were preparing for this case; am I right?

A. Yes. And the best answer I can give you to that now is I don't recall ever doing that in five and a half years, looking in the Homicide Division file, going to the Police Department and looking in their Homicide Division file. Could I have? I never did. That's all I can tell you. I don't recall that being the practice. It wasn't my individual practice. It was simply not the practice of the office.

Q. So let me make sure I'm clear on this. If there was favorable information that was in the police's file that they didn't give to you, you couldn't give that to the defense; am I right?

A. That's correct. Because if I didn't have it, I couldn't give it to them.

Q. And all you were doing was just relying on whatever the police gave to you; is that right?

A. The practice was to rely on the police to give us the [p.543] information relating to the case and then we would turn that information over, yes. That was the

practice. That was the practice in the DA's Office and it's been the practice in every prosecutor's office I've ever worked in. That's the practice. I've never gone through an FBI file, either.

Q. You don't believe it's your obligation as the prosecutor to go through the police file to make sure that there is not *Brady* information in the police file?

A. Sir, all I can tell you is the practice was not that way in the DA's Office and the practice was not that way in any other prosecutor's office I ever went in. There was an affirmative obligation on the law enforcement officers. They understood what the obligation was. And it was their affirmative obligation to communicate that information to us.

Q. And, Mr. Dubelier, am I correct that the person who has the responsibility of producing the *Brady* information to the defense is the prosecutor?

A. That's correct.

Q. That's your responsibility?

A. It's the responsibility of the State, yes.

Q. It's your responsibility as the prosecutor; am I right?

A. Yes, it is, absolutely.

Q. The defense certainly can't get the information from the police, can they?

A. Well, the defense can file a motion and then litigate it in [p.544] court, and maybe get the information or maybe not get the information.

Q. The defense can't pick up the phone and call the police and say, give me your file; correct?

A. I think that would be highly unlikely, yes.

Q. You could do that; right?

A. Again, yes. The simple answer is yes. I don't recall ever having done that, but yes, the simple answer is yes.

Q. All right. Let's take a look at Exhibit 34, please.

A. Yes, sir. I have it.

Q. Have you seen this document before?

A. I think you showed this to me in 19 -- in 2005.

Q. And would you agree with me that this is a motion for the production of exculpatory evidence?

A. That's what it's titled, yes, sir.

Q. And it was filed in the murder case?

A. Yes. And, again, I think I noted the last time I saw it there's handwriting on here and I don't know what that is. It says "see photograph" or something. So I don't know when and who wrote that on there.

Q. Do you have any reason to doubt that is a motion for the production of exculpatory evidence that was served on the prosecutors by John Thompson's lawyers in the murder case?

A. No. I have no reason to doubt that.

Q. Now, in Roman numeral one --

[p.545] A. And, again, let me say, this is not date stamped, so -- but I can't tell you it was filed, but I have no reason to think that it wasn't. It doesn't have a date stamp on it.

Q. And you don't have any reason to doubt that you received that when you were representing the State; right?

A. No. No. No.

Q. In Roman I, Mr. Thompson's lawyers asked for, quote, "the names of any eyewitnesses and copies of statements made by them. This request is based on newspaper articles obtained by the defense which indicate that eyewitnesses gave a physical description of the killer which is inconsistent with John's appearance." Do you see that?

A. Yes, sir, I do.

Q. So what Mr. Thompson's lawyers were looking for were physical descriptions of the killer that were in the possession of the State; right?

A. Yes, sir.

Q. Now, I would like you to look at Exhibit 35, please.

A. Well, they were looking at for physical descriptions that were inconsistent with the defendant's appearance, yes, sir.

Okay. 35, I'm on it.

Q. Well, it's not just limited to that, Mr. Dubelier. It says the names of any eyewitnesses and copies of statements made by them and then it goes on to say simply that it's based on newspaper articles obtained by the defense which indicate that [p.546] eyewitnesses gave a physical description of the killer which is inconsistent with John's appearance; am I right?

A. Right. Right.

Q. So he wanted the names of any eyewitnesses and copies of statements by them?

A. Well, the names of any eyewitnesses and copies and statements by them would not be exculpatory evidence, per se. So no, that's not right. That's not the way you read this. This is a motion for production of exculpatory evidence which means we're obligated to produce the names of witnesses and any physical descriptions that are exculpatory.

Q. So you don't read this as asking for the names of any eyewitnesses and copies of statements made by them?

A. No, I don't. Because it's a motion for production of exculpatory evidence. There was no obligation under

the law in the State of Louisiana at the time to produce names of witnesses.

Q. I think the jury can read this for themselves.

A. I think they can, too.

MR. CARVER: Your Honor, I ask that the exhibit be displayed so the jury can see the first part of that exhibit, the first paragraph.

THE COURT: You'll have a chance when you have the witness on cross-examination.

EXAMINATION

BY MR. COONEY:

[p.547] Q. I would like you to look at Exhibit 35, please, Mr. Dubelier.

A. Yes, sir.

Q. And is this a copy of the State's answer to the motion for production of exculpatory evidence?

A. Sir, when you asked me about this before, it's unsigned. There is no date stamp that it was filed. I don't know whether this was the answer that was actually filed in court. I don't know the answer to that.

Q. I will represent to you that there's a stipulation as to the authenticity of the document. Do you have any reason to quarrel with that?

A. No.

Q. Okay. Now, with regard to Roman numeral one, what this answer says is statement of Mary Wells is attached. Not entitled as to other witnesses?

A. That's correct.

Q. Do you see that?

A. Yes.

Q. Now, Mary Wells, we talked about her earlier in your testimony; am I right?

A. In my own testimony today?

Q. Earlier today, Mary Wells, I showed you a police report from before the Liuzza murder, the Thompson arrest. Take a look at Exhibit 21.

[p.548] A. Oh, Mary Wells, oh, was the thing on the other guy who -- yeah, okay.

Q. And she was a discredited witness at that point; am I right?

A. I guess.

Q. You had concluded -- let's go back to Exhibit 21, if you will.

A. I'll go with whatever you say on this because I have not looked at the record. If Mary Wells said -- gave a description or a name that was inconsistent with what was charged in our case, then we produced Mary Wells' statement so the defense would have that.

Q. Mr. Vincent, can you go back to Exhibit 21, please. And let's go to the second page in the next-to-last paragraph. And this is from January 10th, I believe you testified --

A. Yes.

Q. -- after consultation with the assistant district attorney Eric Dubelier, Detectives Curole and Demma decided not to formally charge Charles Ricks with the murder of Ray Liuzza because all of the facts uncovered in this investigation indicated that he was the innocent victim of a mistaken identification on the part of Mary Wells. That was the conclusion you reached in January of 1985?

A. Yes, sir.

Q. And so the answer that was given by the State of Louisiana to Mr. Thompson's discovery request was to give the name of [p.549] Mary Wells, the person who provided the mistaken identification, but not to provide the name of Mr. Schliffka; am I right about that?

A. No, you're wrong.

Q. That's not what it says?

A. It's what it says. We gave the statement of Mary Wells. We didn't just give the name. We gave her statement to the defense.

Q. And that statement, sir, you had concluded was a mistaken identification; am I right?

A. The -- what I had concluded was the statement was exculpatory and so we had to turn it over pursuant to *Brady*. It's a motion for discovery of exculpatory information and my answer or our answer was, here is the statement of Mary Wells, implicit in us turning over, at least, we reached a determination that it was exculpatory.

Q. And you had also reached the determination that she had made a mistaken identification; am I correct? That's my question, sir.

A. Yes, from that, from reading that, yes, I reached that conclusion.

Q. And you didn't provide Mr. Couhig who was representing Mr. Thompson at the time the name of Mr. Schliffka?

A. Well, we did. We filed an Amended Answer to Motion For Production of Exculpatory Evidence and we did provide Mr. Schliffka's name.

[p.550] Q. The exact document, the first document that I showed you, your first answer, you didn't identify Mr. Schliffka at all, did you?

A. No.

Q. Now, let's go to the next document. Let's look at Exhibit 36. Am I will correct that that's the amended answer that you're referring to?

A. Yes, sir.

Q. And in Paragraph Roman I, you state, "Mr. Paul Schliffka described a man leaving the vicinity of the crime scene as being approximately 6 feet tall. Additionally, Mr. Schliffka failed to make an identification from a photo lineup conducted on January 17, 1985." Do you see that?

A. Correct. Yes.

Q. There is no reference in there to hair length, is there?

A. No, there isn't.

Q. Based on the actual description of the perpetrator from Mr. Schliffka that's contained in the police reports, do you think that the description that you provided to Mr. Thompson there was a full and complete description from Mr. Schliffka?

A. My answer to that question, and I think I've answered this before and I'll answer it again, I believe, from the entire record you've shown me that we're missing a report here. I believe there was an incident report of Carter and the other officer that contained a description of Schliffka that we [p.551] probably used to answer this discovery answer. The reason I say that is, my best recollection of the practice was, the officers who were first on the scene prepared an incident report. No one has been able to give me that incident report, so I don't know whether it doesn't exist or it's not in the record, but I believe that that answer was probably based on an incident report prepared by the officers who were first on the scene. I don't know what that incident report says. I'm sorry.

Q. Mr. Dubelier, are you saying that there's another document that we have never seen in this case?

A. Look, all I'm telling you is -- here is what I'm telling you, the normal practice was that the police would go out, the uniformed officers, the men and women who wore the blue outfits, the uniforms, would go out on the scene, they were first on the scene. They would prepare an incident report. It was their obligation to do that. They came out and they would prepare an incident report. We would always have that because -- they were typically very short and concise and they were prepared quickly and we would get those within a couple of days of an offense. I've not seen that in this record anywhere, and so I don't know what the problem is, but I do know that from the trial testimony, Carter got off the stand and refreshed his recollection with a report. I don't know whether that was the homicide report, the incident report or one of these other reports you've shown me. I just don't know the answer. I can't remember. I'm sorry. I [p.552] wish I could, but I can't.

Q. Would you please take a look at Exhibit 2.

A. Yes.

Q. Does not that not contain information about what Schliffka told Angelo and Carter?

A. Yes, but this is not an incident report. It's different.

Q. Is there any reason why the incident report would include different information than what's in the detective's report?

A. I have no idea.

Q. Typically, they would try to get the same information; right?

A. They would try. They didn't always succeed, but they would try.

Q. It's important?

A. It is important but --

Q. You would want to make sure that the perpetrator's description looks the same in all of the reports; right?

A. Right. That's right, but these are human beings and it didn't always work out this way.

Q. This was a high-profile case?

A. That's right.

Q. They wanted to make sure that they got the information right?

A. That's right.

Q. And so we don't know what that incident report is because [p.553] we've never seen it. We do have the December 6th report and it says, close-cut hair; right?

A. Yes.

Q. That's not information that you provided to the defense; am I right?

A. Well, I'm not sure I didn't provide it. And here's why. Mr. Schliffka testified at trial. My recollection from looking at the trial transcript is Mr. Couhig stated in his opening statement that Mr. Schliffka was going to testify and testify that the perpetrator was 6 feet tall and had close-cropped hair. So where did he get it from? If he didn't get it from us, where did he get it from?

Q. Maybe he got it from the newspaper articles that he referred to in the discovery request?

A. Maybe he did. Maybe he did. The point of it then would be, sir, he had it. Regardless of whether or not he got it from me, he had it prior to the trial.

Q. Would you agree with me as a lawyer, as a defense lawyer, that there is a difference between asking a witness a question without the benefit of a document for impeachment on the one hand and asking the witness a question where you have the benefit of a document for impeachment on the other hand?

A. Sir, I don't know what Mr. Couhig had or didn't have. I simply do not know the answer to that.

Q. I'm asking you a different question.

[p.554] A. Yes, theoretically the way you presented that question, there would be a difference.

Q. It's a lot better to have that document in hand because if the witness says something other than what you're expecting, you can say, "Now, Mr. Witness, wait a minute, hold on, weren't you interviewed by the police on December 6th and didn't you say at that

time, close-cut hair? You didn't say the word 'Afro'; did you?" You could do that if you had the document?

A. Let me tell you what my problem is with the way you're asking this question. You're accusing me 23 years later of having not turned over a document. You deposed me two years ago and you accused me of not turning over a crime scene photograph of Mr. -- of Mr. Thompson. You accused me of that. And when I specifically asked you in the deposition does the record reflect we turned over this photograph, you told me I represent to you that we did not. The State did not turn it over. And you know what. I understand now from the record of this case we did turn it over and you lied to me in this deposition. So the way you're asking this question, I don't have a recollection of whether or not I had this report. I don't have a recollection of what we told them. All I know is the record of this case indicates Schliffka testified at the trial and testified consistent with the information that's in this report. That's what I know now.

Q. Your testimony is that Schliffka's testimony at trial was consistent with this report?

[p.555] A. My testimony --

Q. Wait a minute. Answer my question, please.

A. Yes.

Q. That's your testimony in front of this jury?

A. My testimony in front of this jury is that when I specifically asked you in a deposition two years ago did

we turn over this crime scene photo with Thompson's hair sticking up.

THE COURT: Wait a minute, Mr. Dubelier.

THE WITNESS: I'm sorry. I'm sorry.

THE COURT: You're getting very argumentative. Just try to answer his question.

Restate your question one more time.

THE WITNESS: Your Honor, I apologize.

EXAMINATION

BY MR. COONEY:

Q. Would you agree with me that as a defense lawyer, it is very different to impeach a witness with a document in hand than if you don't have the document?

A. Yes.

Q. Much more useful to have the document, isn't it?

A. Yes.

Q. Now, you talked about some of the testimony from the armed robbery trial. I want to talk about that for a second. I'm going to ask you to go to Exhibit 137, if you would, please.

A. This is the murder trial. You indicated you wanted to ask [p.556] me about the armed robbery trial.

Q. Yes, the murder trial. Would you agree with me that, Mr. Dubelier, that you conducted the direct examination of Officer Carter at the murder trial?

A. Yes, sir, I did.

Q. Okay. And he was one of the police officers that went and interviewed Mr. Schliffka; am I right?

A. Yes, sir.

Q. And Exhibit 2 at least sets forth what the -- what description was provided to Carter and Angelo by Schliffka?

A. I'm sorry. What, Exhibit 2?

Q. Exhibit 2.

A. Yes.

Q. Now, did you ask Mr. Carter the following questions and did Mr. Carter give you the following answers. And I direct you to Pages 65 of the transcript.

THE COURT: Are you going to be a while longer with this witness?

MR. COONEY: Little bit, Your Honor.

THE COURT: All right. It's 10:30. Let's take our morning recess of about 15 minutes. Ladies and gentlemen, please leave your books folded, closed in your chairs or under your chairs. Don't discuss the case when you're out of the court and we'll see you back in 15 minutes.

THE DEPUTY CLERK: All rise.

[p.557] (WHEREUPON, the jury panel leaves the courtroom.)

THE COURT: Mr. Cooney, approximately how much longer do you think you'll be with this witness?

MR. COONEY: I'd say 15, 20 minutes, Your Honor.

THE COURT: Are you going to take Mr. Dubelier?

MR. CARVER: Yes, Your Honor. I was curious how you wanted to handle that. Actually, he is going to be our witness in chief, too. So obviously I'm going to have an open -- I'll have an open cross, actually my cross will be his direct.

THE COURT: You don't get to cross, you get to direct the witness. It's not a true cross-examination. That's fine. Because I know Mr. Dubelier has a flight out, right, this afternoon?

THE WITNESS: Yes. Your Honor, and if I could say I want to apologize again for arguing with counsel.

THE COURT: That's okay. But we want to make sure we get you out of here so you're not -- your flight is not delayed.

THE WITNESS: I appreciate that.

THE COURT: I was hoping we could finish you before lunch. Maybe we can do that. I think we can do that if there are only another 15 minutes or so. I don't know. How long are you going to be?

MR. CARVER: I'm going to go quickly through some of these documents.

THE COURT: An hour or less?

[p.558] MR. CARVER: It will be less.

THE COURT: We should be able to finish him before lunch. We'll come back in about 10 minutes now. Okay.

(WHEREUPON, at this point in the proceedings there was a brief recess.)

(WHEREUPON, the jury panel enters the courtroom.)

THE COURT: Please be seated. Mr. Cooney, you may please continue.

MR. COONEY: Thank you, Your Honor.

EXAMINATION

BY MR. COONEY:

Q. We need to make something clear here, Mr. Dubelier. Let's go back to Exhibit 2, if you can for a second, and, Mr. Vincent, can you pull that up. Exhibit 2 is dated December 6, '84. Pardon me. Exhibit 2, Mr. Dubelier, would you look at Exhibit 2?

A. Yes. Yes.

Q. And the date of that Criminal Investigation Bureau Report is December 6, '84?

A. Yes.

Q. That's the day of the murder?

A. Yes.

Q. And on Page 2 of that document, it contains information about the description that Mr. Schliffka gave to Officers Angelo and Carter; am I right?

A. Yes, sir, I've testified to that.

[p.559] Q. Okay. And on the first page of the document, the description is 6 feet tall, black jacket, blue jeans, close-cut hair, armed with a blue steel revolver, possibly with a 4-inch barrel; am I right?

A. Yes.

Q. That's a description from the night of the murder?

A. Correct.

Q. Okay. Now, do you recall that you conducted the direct examination of Officer Carter during the murder trial?

A. I don't recall it, but I know from looking at the record that I did.

Q. And I would ask you, if you would, if you will please turn to page, I think it's 76 of the murder transcript that is in front of you.

A. Yes, sir.

Q. And actually, if you'll look -- I'm sorry, it's not the correct page. Bear with me for a second. If you'll look at page. You can put it up for me, James. Look at Page 76. Did you conduct the examination of Officer Carter?

A. Yes, I did.

Q. And do you recall asking Officer Carter the following questions and Carter giving the following answers:

"Do you recall interviewing any witnesses on the scene?

"Yes, sir, I did.

"Do you recall the names of the witnesses?

[p.560] "I believe there was one, Mr. Schliffka -- I don't know how to pronounce his name.

"Were any witnesses able to give you any description of the alleged perpetrator?

"Yes, sir, he did.

"Did anyone else?

"No, sir, not that I recall.

"QUESTION: Do you recall the description given to you?

"ANSWER: And this was Detective Carter's answer or Officer Carter's answer. "Yes, sir, I do. It was a black male. He was described as being about 6 feet

tall. He was wearing a black leather jacket and dark pants. He was also dark complected."

Question by you, "Was any further description given to you of the perpetrator by Mr. Schliffka?

"ANSWER: No, sir."

Did I read that correctly?

A. Yes.

Q. And Mr. Carter didn't mention the hair length, did he?

A. No, he did not.

Q. And if you turn to Page 77, am I correct that at that point Mr. Couhig who represented Mr. Thompson at the time conducted the cross-examination of Detective Carter or Officer Carter; am I right?

A. Yes.

[p.561] Q. And did Mr. Couhig ask the following questions and Officer Carter give the following answers?

"Officer, did Mr. Schliffka tell you that there was one perpetrator or two?

"He stated that he had seen only one -- only seen one perpetrator.

"QUESTION: Did you ask him about the hair?

"ANSWER: Excuse me?

"QUESTION: Did you ask him about the perpetrator's hair?

"ANSWER: Yes, sir. We tried to ask him as much as we could about the description.

"QUESTION: Tell the jury what he said about the man's hair.

"ANSWER: I can't recall at this time.

"QUESTION: Do you have a police report? Did you fill out a police report?

"ANSWER: Yes, sir, my partner did.

"QUESTION: You recall that you were called at 12:43. Did you review that police report before testifying today?

"ANSWER: Yes, sir, I did.

"QUESTION: Does your police report contain the description that Mr. Schliffka gave you?

"ANSWER: I don't recall that he did.

"QUESTION: Do you have the police report with you [p.562] today?

"ANSWER: No, sir.

"QUESTION: Did you send out, call your dispatcher and give any sort of description of the perpetrator?

"ANSWER: Yes, sir, we did.

"QUESTION: Would that have contained a condition of the hair if you had gotten it?

"ANSWER: I'm sure it would.

"Is it your testimony that you can't recall that today?

"ANSWER: That is true."

Is that what Officer Carter testified to in response to examination by Mr. Couhig?

A. Correct.

Q. Now, continuing with the transcript, if you look at Page 78, and, Mr. Vincent, if you could put this up, I would appreciate it. Am I correct that after Officer Carter denied remembering anything about the hair, Mr. Thompson's lawyer, Mr. Couhig asked the Court to have Officer Carter refresh his recollection about the hair length by looking at the police report.

A. Would you ask me a question?

Q. Is that what happened?

A. According to this transcript, yes.

Q. And you don't have any reason to quarrel that's what happened in the courtroom; right?

A. No, no, not at all.

[p.563] Q. And at this point what happened is Officer Carter actually got off the witness stand and walked over to the prosecutor's table; am I right?

A. I'm assuming from the record, yes, the witness stepped down from the witness stand and went to prosecutor's table, yes.

Q. That's what it says. So Mr. Couhig asked the question about the hair length. Carter said he couldn't remember, he gets down and he walks over to the table where you and Mr. Williams are standing; is that right?

A. Sitting down.

Q. Sitting. Okay. And the three of you looked at the report; is that right?

A. Well, this says he looked at the report.

Q. Do you have any -- would you have looked at the report with him, Mr. Dubelier?

A. No, I probably would have handed him the report and let him look at it.

Q. And then he went back to the witness stand?

A. Right.

Q. And am I correct that John's lawyer, Mr. Couhig, asked the following questions and Carter gave the following answer:

"QUESTION: Describe the hair.

"ANSWER: Okay. It was black and short. Afro style."

A. Right.

Q. "QUESTION: How tall was he?

[p.564] "Approximately 6 feet.

"QUESTION: Thank you, sir. No further questions."

A. Correct.

Q. And I think we've established that there's no reference to Afro style in Exhibits 2, Exhibits 5 or Exhibit 30; am I right?

A. Right. And that's the basis for what I said here earlier, sir. We have to be missing the incident report here that Carter himself filled out. There had to have been a report he filled out because that's what he got off the stand to look at. He talked about his own report. None of the reports you've shown me are his report.

Q. He didn't testify it was his own report. He said it was his partner's report; correct?

A. Well, you haven't shown me a report filled out by his partner, either.

Q. Well, we don't have it, either, Mr. Dubelier.

A. I'm sorry, I don't have it. Okay. I wish I had it. But from the sequence you read here to me, and my experience in the office, there must have been an incident report that Carter and his partner prepared at the time. And I'm assuming based on this testimony, this police officer is not out of his mind. He's not going to get off the witness stand, walk over, read a report, get back up on the witness stand and testify inconsistent with the report he's just read.

Q. Unless he was trying to mislead the jury; right?

[p.565] A. Well --

Q. Unless he was trying to mislead the jury. That's one possible explanation?

A. I have no reason to believe this officer or anybody else was trying to mislead the jury on this issue. We turned over Mr. Schliffka's name. We specifically advised the defense lawyer that Mr. Schliffka failed to identify the defendant in a photo lineup which is about as exculpatory as you can possibly have. One eyewitness and he failed to identify the defendant. So we turned over a picture of the defendant from an arrest several days before where his hair was sticking straight up, which is inconsistent with the description that Mr. Schliffka gave. So I don't know what else we could have done.

Q. So it's your testimony that this police report that nobody has seen here says something different from the three other reports that we have seen? That's your testimony?

A. What I'm saying is you have not shown me a report prepared by this officer or his partner. I'm not being critical of you for that. If you don't have it, you don't have it. And I don't have it, either, and I don't know where it is, but there must have been another report.

Q. And you've seen three reports that don't include the word "Afro style"; am I right?

A. Yes. Yes.

Q. Now, Mr. Williams examined Mr. Schliffka at trial; is that [p.566] right?

A. If the record reflects he did, he did. I don't know. I don't remember.

Q. I'm going to ask you to go to Page 89 in the transcript, if you would.

A. Yes, Mr. Williams did.

Q. And would you agree with me that on redirect -- and I would ask you to go to Pages 103 to 104 of the transcript -- there was the following question and answer between Mr. Williams and Mr. Schliffka:

"QUESTION:"

A. Can I catch up, please.

Q. Pages 103 to 104.

A. I know, but I would like to have just a moment to see what he said leading up to that so I can take these questions in context. Okay.

Q. So on Pages 103 and 104, did Mr. Williams ask the following questions and get the following answers from Mr. Schliffka:

"All right, Mr. Schliffka, you're still under oath. Now, could you describe, let me ask you this question first. You have previously testified that the person that you saw had an Afro type haircut; is that correct?

"ANSWER: Yes.

"QUESTION: All right. Did the person who went by you have his head shorn like and slicked back?

[p.567] "ANSWER: No.

"QUESTION: It was sort of like blown up? Would you describe it a little bit more for the ladies and gentlemen of the jury?

"ANSWER: It wasn't a large picked out Afro. It was closer to the head and it was straight back.

"QUESTION: Okay. When you say not a large Afro, you'd say about like this?

"No, closer to the head.

"QUESTION: All right. Describe using your hands the shape of the man's hair that you saw on your own head.

"Okay. It was like this and back.

"Thank you, sir. I have no other questions."

Would you agree with me that none of that is in the three police reports that we've seen in this case?

A. Sir, you have to take the context of that testimony and the testimony he gave in response to Mr. Couhig's questions several pages before, which is why I asked to have the opportunity to read that. He said he had short hair. And it was Afro style, so I don't view short hair and Afro style as being inconsistent with each other. I guess I didn't view it that way at the time and I don't view it that way today. I don't understand the difference.

Q. The information that is elicited by Mr. Williams here, he asked it was sort of like blown up, he says, the question is about an Afro style type haircut and this information about it [p.568] was like this and back.

A. Well --

Q. Wait a minute. Wait a minute. Let me ask the question, please.

A. No, you wait a minute. You just --

THE COURT: No, no, no, wait. Mr. Dubelier, you have to let him ask the question and then answer the question.

THE WITNESS: I will.

EXAMINATION

BY MR. COONEY:

Q. None be of that information is in the three police reports we have seen; am I right?

A. We are right. You just held your hands up. One of the problems with this record is I don't know what Mr. Schliffka or Mr. Williams did with their hands. I don't know whether they went like this or they went like this (indicating). You put your hands out here. There is nothing in the record that I see that would reflect the gesture you just made is consistent with what happened in court.

Q. Do you think that Mr. Schliffka's testimony six months after the event that we just read is consistent with the police reports that we have seen in this case?

A. I don't view Mr. Schliffka's testimony inconsistent with what he told the police.

Q. But my question, I want to make sure we're clear on this, do [p.569] you believe that the testimony that I just read from Mr. Williams, the interrogation by Mr. Williams of Mr. Schliffka, it is your testimony that that was consistent or inconsistent with the description of the perpetrator that's contained in the three documents that we have seen, sir?

A. When you take the entirety of Mr. Schliffka's testimony, both on direct, cross and redirect, I do not

view it as being inconsistent with the information that is in the police report.

Q. Do you think that the defense lawyers -- if you were the defense lawyer in this case, and you were representing Mr. Thompson, would you have wanted to have those police reports that simply said close-cut hair or short hair?

A. In the context in this case involving this witness, that wouldn't have made any difference.

Q. That wouldn't have made any difference to you as a defense lawyer?

A. No, because you're dealing with a witness who testified under oath, I looked at a lineup of John Thompson and I couldn't pick him out. So you're dealing with a witness who says I saw for a moment somebody running 50 feet away at night in the dark under a stressful situation, I looked at a lineup and I couldn't pick out the defendant. I can't think of anything more exculpatory. We put that witness on. I can't think of anything more exculpatory to Mr. Thompson. I don't know what else I would have done if I had anything else.

[p.570] Q. Mr. Dubelier, your testimony to the jury is, you wouldn't have wanted to have that document as the defense lawyer for Mr. Thompson to show that the only thing that was in those documents was short hair or close-cut hair? No reference to an Afro, no reference to blown up. No reference to back, none of that? You wouldn't have wanted to have that?

A. What I'm saying is it wouldn't have made any difference.

Q. Mr. Dubelier, was everything that you did in prosecution of the John Thompson case consistent with the policy of the Orleans Parish District Attorney's Office?

A. Yes, it was.

MR. COONEY: I have no further questions, Your Honor.

THE COURT: All right. Mr. Carver.

MR. AARON: Can we approach just for a second?

(WHEREUPON, there was a bench conference held outside of the presence of the court reporter.)

THE COURT: Okay. Maybe I should explain briefly to the jury. Mr. Dubelier is actually a party to the case. He's a named defendant, even though he's sued in his official capacity so he's really a defense witness in the case. The plaintiffs called him under what's called cross-examination, which they have a right to do as part of their case. Ordinarily, what you're going to hear now would be presented in the defense portion of the trial, but in order to try to accommodate the witness, who is now residing out of town, the parties have agreed and I've [p.571] allowed the defendant to -- the defense to put on essentially part of their case at this time. So what you're going to hear now is actually part of the defense case.

Go ahead, Mr. Carver.

MR. CARVER: Thank you, Your Honor. Your Honor, I have some exhibits that I would be referring to and I would like to hand those to the witness.

THE COURT: Sure.

MR. CARVER: Thank you. Your Honor, before I start, what I would like to do is have an opportunity to read one stipulation that the parties have agreed to.

THE COURT: All right.

MR. CARVER: Uncontested material fact Number H. Mr. Dubelier and Mr. Williams moved to reverse the order of the trials so that the armed robbery trial would be held approximately three weeks before the murder trial, an action that is not improper, illegal, or unethical by Louisiana law.

DIRECT EXAMINATION

BY MR. CARVER:

Q. Mr. Dubelier, would you go ahead and state your current occupation for us?

A. I'm a lawyer.

Q. And where do you practice?

A. The office of my law firm is in -- I'm in the Washington, D.C. office of my law firm, but I practice nationwide.

* * *

[p.576] 1998.

Q. Let's go backwards again. At the time you worked at the DA's office from 1981 through 1987, who was the District Attorney during that time period?

A. Mr. Connick.

Q. During that time period you worked at the DA's office, were there certain policies that you had to follow and obey?

A. Yes, sir.

Q. Who established those policies?

A. Mr. Connick.

Q. What was Mr. Connick's policy with respect to the disclosure of what we call *Brady* material to the defendant?

A. Mr. Connick's policy was to comply with the law.

Q. What would happen if you failed to comply with that policy?

A. You would be subject to discipline.

Q. By who?

A. By Mr. Connick. We all served at his pleasure. He hired us, he could fire us.

Q. In addition to being fired by Mr. Connick for failure to follow his policies, were there any other deterrents

which would preclude your -- or prevent you from disobeying his policy?

A. Yes, sir, there were bar rules, ethics rules. I don't remember particularly what they were in Louisiana, but there were common ethics rules from whatever bar you're a member of. I'm a member of the Louisiana Bar, the D.C. Bar, the New York Bar and [p.577] there were obligations when you're serving in a public capacity as a prosecutor to meet certain ethical requirements.

Q. Those are mandatory requirements?

A. Yes, sir, they are.

Q. And what would happen if you failed to follow the mandatory ethical requirements set by the Bar Association?

A. You would be subject to discipline by bar counsel up to and including disbarment.

Q. Meaning you couldn't practice law anymore?

A. Correct.

Q. When you worked at the DA's office, what was your practice with respect to Mr. Connick's policy?

A. To comply with the policy and to comply with the law.

Q. Did you have any authority to change that policy?

A. No, sir, I did not.

Q. And you mentioned for us that you went to law school. And obviously, law school we learned from previous testimony is a three-year endeavor; correct?

A. It was four for me because I did the joint degree program.

Q. Were there any subjects in law school that you took that were applicable to your job as a prosecutor?

A. Criminal law, criminal procedure, constitutional law. There may have been also a constitutional criminal procedure course on top of that.

Q. Upon graduating from law school, it's my understanding there [p.578] is a bar examination; correct?

A. Yes, sir.

Q. What's the purpose of a bar exam?

A. To determine whether you've got the proper knowledge level based on your education to practice law.

Q. Were there any subjects on that bar exam that are related, that were related to your duties as a prosecutor?

A. I remember it was a three-day exam in the Superdome and there were nine exams and I don't remember whether -- I don't know whether there was a specific constitutional law exam or a criminal law exam. I just can't remember.

Q. You obviously passed the bar exam?

A. Yes, sir, I did.

Q. When did you first learn that there was this legal requirement to disclose what we call *Brady* or exculpatory evidence to a defendant?

A. I'm certain I learned that in law school. I also after my first year of law school did an internship, an unpaid internship in the District Attorney's Office in Manhattan in New York, and I'm sure -- I worked on several matters there and I'm sure that's something that I would have learned there as well.

Q. By 1985, how would you quantify your experience as a prosecutor?

A. I probably tried and the record of the DA's office would reflect this with more precision, but I probably tried maybe a [p.579] hundred or so cases, somewhere in that ballpark. I mean, it could have been more, it could have been less, but a significant number of cases.

Q. Were any of those murder cases?

A. Yes, they were.

Q. Any of those armed robbery cases?

A. Yes, they were.

Q. While you had worked at the DA's office, what type of guidance or instruction did you receive with respect to the disclosure of *Brady* evidence?

A. The way it was structured is that as younger lawyers, you were never given primary responsibility to do the things you needed to do without being supervised in some way. So we started out, I started out in the Juvenile Division and there were supervisors down there monitoring what we were doing. We were also dealing primarily there, there were no juries, so we were just dealing with judges in terms of the trials we were having. And then when we were transferred to the Trial Division, it would also be a senior lawyer and a junior lawyer and everything was done in tandem. There had to be two lawyers involved. And primarily the training was on-the-job training. We had dockets of cases every day that had to be tried and the senior person in the court assigned to the court was responsible for training the younger lawyer so that that person could ultimately become a senior level lawyer.

[p.580] Let me also say that, you know, when I talk about senior and junior, it's in very relative terms. And that is, I think the typical career in the office was three years, so if you had three years in, you were a senior level person.

Q. Other than the on-the-job training that you described, what other training did you do with respect to disclosure of *Brady* material?

A. You know, I can't remember specifically. We were responsible for staying up to date on case law. I know important cases relating to criminal procedure issues in Louisiana and both out of the U.S. Supreme Court or the federal courts were circulated periodically, so, you know, it was our primary responsibility to stay up to date and as best the office could, I think it was

basically our appellate lawyers took responsibility for doing this, circulating important information that it was necessary for everybody to know as the law was evolving because as you probably know, there was a significant evolution of *Brady* and the cases that followed it during this time period.

Q. With respect to the armed robbery of John Thompson back in 1984-85 time frame, were you aware that blood evidence existed?

A. You know, as I've answered before, sir, I don't know that I was aware and I don't know that I wasn't aware. All I know is I didn't try the case, and I cannot remember.

Q. Do you know if Jim Williams was aware of the existence of blood evidence?

[p.581] A. Somebody -- something caused Whittaker to write on the Screening Action Form blood test. So institutionally, the office knew that there was something involving blood involving that armed robbery case. Did I specifically know or look at the Screening Action Form? I don't know. But the office knew that there was something having to do with blood in that case.

Q. Did -- my question was the prosecutor Jim Williams?

A. I would have no idea. I've spoken to Jim Williams one time in the past 18 years and I ran into him in 1999 when we all testified about this, and I said hello to him in the hallway and that was it. You know, I

want to make it clear, Williams and I were not friends. We were colleagues, but we were not friends.

Q. Did you ask Mr. Williams to handle a Motion to Suppress hearing in the John Thompson case?

A. I know from the records that you've shown me that he did, in fact, handle the hearing. I don't know whether I asked him to or he did it on his own initiative. If he says I asked him to, I would go with his best recollection of that.

Q. Let me show you what's previously -- already been admitted into evidence which is Exhibit 40, which is the first page of the packet I provided to you.

A. Yes, sir, I have it.

Q. And you would agree that's the transcript of Motion to Suppress hearing in the John Thompson trial on March 11, 1985?

A. Yes, sir, I see that it is.

* * *

[p.599] A. No, I don't.

Q. Just so the jury -- what was the significance of Kevin Freeman with respect to the murder?

A. Kevin Freeman was the co-perpetrator. He was with Mr. Thompson, according to the evidence we had in 1985.

Q. It has been suggested, Mr. Dubelier, that you did not follow the law with respect to *Brady*. How do you respond?

A. My response is that that's not true.

Q. It's been suggested that you didn't understand *Brady*. How do you respond?

A. I understood *Brady*. I understood our obligations pursuant to *Brady* and I made every effort to comply with what those obligations are. In 17 years of being a prosecutor, did I ever make a mistake, maybe I did, but I never did anything knowingly, intentionally or negligently that was either unethical or improper.

Q. What did you ever do with respect to the John Thompson armed robbery trial, murder trial which was not in compliance with Harry Connick's policy to follow the law?

A. Nothing.

MR. CARVER: Your Honor, I have no further questions.

THE COURT: Any redirect?

MR. COONEY: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. COONEY:

* * *

[p.603] response to his inquiry of where's the blood evidence, it's at the lab.

Q. And that's an assumption on your part; correct?

A. Yes, it is.

Q. I would like you to look at Exhibit 34, which is a Motion For Production of Exculpatory Evidence.

A. Yes, sir.

Q. And we've focused on a couple of other paragraphs, but I would like you to look at Paragraph 4. And, Mr. Vincent, if you could put that up. In Paragraph 4, this is a very specific request by Mr. Couhig and what he asks for here is any and all police reports made by the homicide investigators which must necessarily be replete with accounts of identifications inconsistent with the defendant's appearance. That's the first sentence; right?

A. Yeah.

Q. So he's not just asking you to produce the stuff that's in your file. He says, I want any and all police reports made by the homicide investigators. That's what he asked you?

A. Yes.

Q. I would like you to look at Exhibit 2. Would you agree with me that Exhibit 2, which we've talked about before, is a report by homicide investigators?

A. Yes, it is.

Q. And that's one of those reports that has the, that says [p.604] close-cut hair?

A. Yes, it does.

Q. And Exhibit 5, let's look at that one.

A. Right.

Q. And Exhibit 2 was the one on the night of the murder, December 6th. Am I right?

A. Yes.

Q. And Exhibit 5 is December 8th, and that's also a homicide investigator report?

A. Right.

Q. And that's got the description, short hair? You see that?

A. Yes.

Q. And Exhibit 30, is that a homicide investigator report?

A. Yes.

Q. And that description, if you recall, on Page 12, was close-cut hair?

A. Yes.

Q. So Mr. Couhig, what he did, John's lawyer in the murder case, asked for homicide investigator reports

that are inconsistent with the appearance of Mr. Thompson?

A. Right.

Q. Right?

A. Right.

Q. Okay. Let's look at the first response that Mr. Carver took you through, which is Exhibit -- actually, I want to have you [p.605] take a look at Exhibit 35, which is one of the exhibits that I asked you to look at.

A. Yes, sir, I've got it.

Q. Would you agree with me that the request by Mr. Couhig, John Thompson's lawyers for any and all police reports made by homicide investigators which must necessarily be replete with accounts of identifications inconsistent with the defendant's appearance, would you agree with me that that was Roman numeral IV in the request?

A. Right.

Q. And in Roman numeral IV of the State's response, the answer was none?

A. Right.

Q. It doesn't say we're not going to produce them to you. It doesn't say we just go looked at our own file. The answer of the State of Louisiana was there were no police reports made by homicide investigators which are replete with accounts of identifications

inconsistent with the defendant's appearance. Is that the response of the State of Louisiana?

A. Yes, it was.

Q. Do you think that's an accurate response?

A. Yes.

Q. That's your testimony?

A. Yes.

Q. You think that testimony with regard to the hair length, [p.606] that information with regard to the hair length that was in those homicide investigator reports is not inconsistent with defendant's appearance?

A. That answer was based on what was known to us at the time.

Q. Mr. Dubelier, it didn't ask you for what was known to you at the time. It specifically asks you for police reports made by the homicide investigators.

A. That's right.

Q. Did you ask the homicide investigators whether they had such information?

A. I don't know whether or not I did. What I did do was provide the name of Mr. Schliffka. I provided information about Mr. Schliffka. Mr. Thompson's lawyers knew that Mr. Schliffka had stated that Mr. Thompson had close-cropped hair. They knew that because they said it in the opening statement, and we

provided them with a copy of a Bureau of Identification picture that had been taken several days before the murder in connection with an unrelated arrest that had Mr. Thompson with big hair sticking up which was inconsistent with what the description was of Mr. Schliffka. We gave them everything we had relating to this issue. It would have been --

Q. Mr. Dubelier, your testimony is you had the B of I picture at that point. You knew that he had that bushy hair; right? That's what you just said to the jury.

A. Well, here's -- here is what I know. I know that when I [p.607] testified two years ago --

Q. That's not my question, Mr. Dubelier. My question to you, Mr. Dubelier --

THE COURT: Wait a minute. Wait a minute. Wait a minute.

THE WITNESS: I'm not arguing.

THE COURT: Ask the question again. Mr. Dubelier, just answer the question. Let's not argue with each other.

MR. COONEY: Thank you, Your Honor.

EXAMINATION

BY MR. COONEY:

Q. Am I correct that you just told the jury that when you made this response, you had the B of I picture of Mr. Thompson with the bushy hair?

A. No. No, I'm saying I didn't say that.

Q. When did you have the B of I picture of Mr. Thompson with the bushy hair?

A. Last night I reviewed a court decision in connection with this matter from Judge Livaudais.

Q. You are not --

MR. COONEY: Your Honor, he is not answering the question.

THE COURT: Mr. Dubelier, just answer the question. We don't want you to talk about court decisions.

THE WITNESS: I'm trying to think how I can answer the [p.608] question, then, Your Honor, because I only know it from -- I don't have a personal recollection of it. I only know of it from looking at a document. Can I say a document without saying what the document was?

MR. COONEY: Let me ask a slightly different question.

EXAMINATION

BY MR. COONEY:

Q. Did you not just tell the jury that at some time in the John Thompson prosecution, whether it was before you wrote this response or some other time, that you had a picture of John Thompson with the big, bushy hair?

A. I understand that the record of the case indicates that we tried to offer the picture into evidence and the defense attorney objected. That's my best understanding of this issue.

Q. So your testimony is you had the picture?

THE COURT: Mr. Dubelier, you can answer that "yes" or "no." Did you have the picture?

THE WITNESS: My understanding --

THE COURT: No, no. Answer that "yes" or "no."

THE WITNESS: I cannot -- I don't remember whether I had the picture.

THE COURT: From reading the record, you can't tell --

THE WITNESS: From reading the record, I believe we had the picture, yes, from reading the record.

THE COURT: Okay. Next question.

[p.609] EXAMINATION

BY MR. COONEY:

Q. This request, Mr. Couhig's request specifically asked you to provide any police reports made by the homicide investigators; correct?

A. That contained descriptions that were inconsistent with the description or with the appearance of Mr.

Thompson. The appearance when, I have no idea. The appearance of Mr. Thompson.

Q. Do you think the fair -- fair interpretation of that question was on the night of the murder?

A. Yes.

Q. Okay. And would you agree with me that the State of Louisiana's response wasn't, we're just telling you what we've got in our possession. We don't have it. What you told Mr. Couhig because the question was any and all police reports, not just the ones in your possession, your response was none.

A. That's right.

Q. And then I would like you to look at Exhibit 36, please. Is that an amended answer to the Motion for Production of Exculpatory Evidence?

A. I'm sorry, what exhibit?

Q. Exhibit 36 from the binder, please.

A. Yes.

Q. Okay. And is that your signature that appears at the bottom?

[p.610] A. Yes, sir, it is.

Q. And in Roman numeral IV and V, am I correct that you don't provide any information there about homicide investigation reports, do you?

A. No, we do not.

Q. Okay. Just talks about Kevin -- Kevin Freeman?

A. Yes.

Q. With regard to Mr. Couhig's opening statement in the murder trial, am I correct, you don't know where Mr. Couhig got whatever information he had about the hair length of the perpetrator?

A. That's right. I don't know whether he got it from us or not.

Q. He could have gotten it from the newspaper, could have gotten it from some other location. You don't know where he got it?

A. Could have gotten it from Mr. Schliffka.

Q. And would you agree with me that an opening statement is not evidence?

A. It is not. It's the intention of what the evidence is going to be.

Q. A police report, on the other hand, that could be evidence; am I right?

A. Well, no, not technically. It's the testimony that's the evidence.

Q. Would you agree with me that a police report could be a [p.611] piece of evidence in a piece of litigation?

A. Yes.

Q. Now, with respect to this reward issue, the existence of a reward in the Liuzza case, that was well known; right?

A. If you tell me it was, it was. I don't remember, but if you tell me the record is clear and it was in the newspaper, I will not dispute you on that.

Q. Would you agree with me that there's a difference between knowing about the existence of the reward, a reward on the one hand, and whether a witness made some kind of effort to collect on a reward on the other?

A. Yes, there is a difference.

Q. You also talked about witness safety issues and talked about some of the dangers associated with giving out witness names. I'm correct you gave out Mr. Schliffka's name in this case; correct? You gave the defense Mr. Schliffka's name?

A. Correct.

Q. There was no danger issue about giving out the hair length that Mr. Schliffka reported; correct?

A. No.

Q. Mr. Vincent, would you be good enough to put up Exhibit 23, please.

Now, Exhibit 23, is that one of the documents that Mr. Carver was asking you about?

A. Is that in your binder or in his collection?

[p.612] Q. It's in his collection. It's the last document in his collection, Mr. Dubelier.

A. Got it.

Q. Okay. And I would like to direct your attention, if I could, to the last page of the document, Page 4.

A. Yes, I have it.

Q. And in this particular paragraph, this is information about what Kevin Freeman supposedly told Richard "Funk" Perkins; is that right?

A. The way I read this is, this is Curole and Demma talking to Perkins about what Freeman told him. If I'm reading it correctly.

Q. I think that's right. I think that's right. Okay. Now, looking at this document, one of the things that at least Perkins says that Freeman said was, quote, "They purposely cruised the St. Charles Avenue area looking for white men to rob because they believed the people in that area were rich and carried a lot of cash." Do you see that?

A. Yes.

Q. Is it your recollection, Mr. Dubelier, that that information is inconsistent with the testimony of Mr. Freeman from the 1985 murder trial of John Thompson?

A. I don't know.

Q. And so if the record reflected that Mr. Freeman testified that he was riding with John Thompson and didn't think anything [p.613] was amiss, they ran out of gas, they were walking along and the next thing he knew, Mr. Thompson was going to go, quote, unquote, "hit Mr. Liuzza," would you agree with me that that sentence is inconsistent with that testimony?

A. Yes.

Q. And would you also agree with me that this document says, when he, Freeman, realized that Thompson intended to shoot Liuzza, he left him and ran to the vehicle. As he reached the vehicle, he heard several gunshots, at which time he entered his vehicle and drove away? Do you see that?

A. Right. Right.

Q. Do you recall whether Kevin Freeman testified in the 1985 murder trial of John Thompson that he and Thompson were driving, that the car ran out of gas, that he parked the car, that he was walking with Thompson, when he saw something happen, he ran away, went home, took his bath, and came back the next day with $2 worth of gas to get his car?

A. Are you saying that's what he testified to in the murder trial?

Q. Do you recall that?

A. No.

Q. If he said that --

A. I'm not going to dispute it. If he said it, he said it.

Q. If he said that, would that be inconsistent with what's in this document?

[p.614] A. It would be inconsistent with what Perkins said Freeman said. What Demma says Perkins said Freeman said.

Q. This would be inconsistent?

A. Yes.

MR. COONEY: I have nothing further.

THE COURT: You can step down Mr. Dubelier. Thank you.

THE WITNESS: Thank you, Your Honor.

(WHEREUPON, the witness is excused.)

THE COURT: Who is your next witness?

MR. LITVIN: Mr. Trenticosta. He'll be maybe 20 minutes or so.

THE COURT: Is he here now?

MR. CARVER: He is.

THE COURT: That will work just about perfectly. We'll recess for lunch just about 12:30. Is everybody on the jury okay?

THE DEPUTY CLERK: Please raise your right hand.

NICHOLAS J. TRENTICOSTA

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: My name is Nicholas Trenticosta.

DIRECT EXAMINATION

BY MR. LITVIN:

Q. Mr. Trenticosta, would you tell us, please, what your occupation or profession is?

* * *

[p.715] Okay. Do the plaintiffs have any further witnesses or evidence?

MR. BANKS: We do not, Your Honor, the plaintiff rests at this time.

THE COURT: All right. Very well. Ladies and gentlemen, we've concluded the plaintiff's portion of the trial. Now we're going move into the defendants' case. And, Mr. Aaron, you can call your first witness.

MR. AARON: Michael Riehlmann.

THE DEPUTY CLERK: Please raise your right hand.

MICHAEL RIEHLMANN

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: Michael Riehlmann, last name is R-I-E-H-L-M-A-N-N.

DIRECT EXAMINATION

BY MR. AARON:

Q. Mr. Riehlmann, I have no prepared questions so this should go pretty quick.

A. Okay.

Q. What's your occupation?

A. I'm an attorney.

Q. How long have you been an attorney?

A. 25 years.

Q. Have you ever been an Assistant District Attorney?

[p.716] A. Yes.

Q. When were you an Assistant District Attorney?

A. From October of '85 to October of '88.

Q. And was that in the Orleans Parish District Attorney's Office?

A. Correct.

Q. Did you ever have occasion to make the acquaintance of an attorney by the name of Gerry Deegan?

A. I did.

Q. Did you make that acquaintance while you were an employee of the District Attorney's Office or outside of that arrangement?

A. We met the first week we both began law school.

Q. And were you both in the District Attorney's Office at the same time?

A. He was there before me, but there was a period of time where we were there together, correct.

Q. Is it fair to say that you and Gerry Deegan were close friends?

A. Very.

Q. Mr. Deegan, as I understand it, is currently deceased?

A. That's correct.

Q. And to the best of your recollection, when did he die?

A. July 22, 1994.

Q. '94?

A. Yes.

[p.717] Q. Prior to Mr. Deegan dying, did he ever reveal anything to you with respect to the suppression of evidence while he was an Assistant District Attorney for the Parish of Orleans?

A. He did.

Q. And would you tell the jury what he related to you?

A. Well, as best as I can recall as being 13 years, we had a conversation in April of 1994. I believe it to be April. That was when he discovered that he, that cancer that he had been treated for previously had recurred and that the prognosis was terminal. His doctors had given him just a few months to live and he told me -- one night we were in the barroom that is a block down from the Criminal District Courthouse, he told me, as best that I can recall, that he had failed to inform the defense of exculpatory information in a case. I can't recall with any real specificity what else we said about it.

Q. Did he say that anyone else was involved with the suppression or did he just simply say, "I did it"?

A. He may have said that someone else was involved, but I don't recall.

Q. But you do recall him saying that he did it?

A. Yes.

Q. Were you ever contacted by John Thompson's attorneys with respect to the information that you got from Gerry Deegan?

A. Yes.

Q. Could you explain to the jury the circumstances and what [p.718] transpired?

A. What happened was, my former law partner, Bruce Whittaker and I, we shared an office, not -- we had a big what had previously been a library in the law office. We shared it. We had two desks in there where we would work, we would naturally converse. In addition to being law partners, long-time friends and he came back from Criminal District Court. He worked as a public defender, he came back one morning and explained to me about a conversation that he had with Mr. Thompson's attorneys and what he said I don't recall in particular, but the details that he did provide me with reminded me of the conversation that I had with Mr. Deegan some five years before. The conversation that I had with Mr. Whittaker was sometime in 1999. And so as we discussed it more, I recalled the conversation I had had with Mr. Deegan. I told him, Gerry told me that he had failed to turn over stuff that might have been exculpatory, and he said, "Well, we need, you need to contact Mr. Cooney and Mr. Banks and tell them what you know." And that's what I did.

Q. Okay. Let me refer you to, and I'll put it up on the screen, Trial Exhibit Number 58. Have you ever seen that document before?

A. I recognize my signature, but my eyesight is not good enough for me to read the question.

Q. It purports to be an affidavit done State of Louisiana, Parish of Orleans, it says, "Before me notary came and appeared [p.719] on the 27th day of April 1999 where I could be duly sworn and attested to the following: That I'm a practicing attorney and have been since October 1983, that I worked as an Assistant District Attorney from October 1985 until October 1988. Gerry Deegan was a close, personal friend of mine and he was also an Assistant District Attorney between 1984 and 1987. He and Jim Williams were trial attorneys in the armed robbery trial of John Thompson," and then it goes on. Then there is a signature below that purports to be a signature of one Michael G. Riehlmann?

A. That's my signature.

Q. That's your signature. Do you recall executing this affidavit?

A. I do.

Q. To the lower left of the document, it says, "Sworn to and subscribed before me the aforesaid" and it says notary public, do you recognize that signature?

A. It's Bruce's signature.

Q. By Bruce, you mean with Bruce Whittaker?

A. I do.

Q. There was a Bruce Whittaker who previously served in the District Attorney's Office, is that the same person?

A. That's correct.

Q. And you and he were law partners?

A. That's correct.

[p.720] Q. Okay. Now, as a result of signing this affidavit, did you run into a spot of bad luck professionally?

A. Mr. Connick referred a complaint to the bar association as a result of my involvement with this.

Q. So Mr. Connick filed a complaint with the bar association?

A. That's correct.

Q. And was this complaint reviewed, to the best of your knowledge, by the Office of Disciplinary Counsel?

A. It was.

Q. And were formal charges ever filed against you?

A. Yes.

Q. And what were the charges that were filed against you?

A. Failure to report another attorney's misconduct. There were other charges, but I believe that that, that's the gist of it.

Q. And was -- were those charges presented to a hearing committee of the disciplinary board?

A. Yes.

Q. And what was the finding of that hearing committee?

A. I don't recall what the finding of the hearing committee was.

Q. Did the matter get appealed from the hearing committee to the disciplinary board?

A. Yes.

Q. Do you recall the finding of the disciplinary board?

A. I really don't.

[p.721] Q. Did the matter go to the Louisiana Supreme Court?

A. Yes.

Q. Do you recall what the Louisiana Supreme Court did?

A. Yes. They --

Q. What did they do?

A. They sustained Mr. Plattsmier's charges finding that I did indeed fail to timely report another attorney's misconduct.

Q. Now, in the affidavit, you say that at some time prior to 1994, and after 1985, that's a big, pretty big range, you can't pin it down any more than that?

A. I honestly can't read, as highlighted there, so I don't know. Could you read the whole thing?

Q. Well, this is what your affidavit says.

A. Okay.

Q. That at some time prior to 1994 and after 1985, the late Gerry Deegan said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.

A. No, I can't pin it down more. It was in April of '94. That's what I believed to the best of my ability, yeah.

Q. Do you think it was shortly before Mr. Deegan died?

A. Well, I know it was in -- it was in the same conversation that he told me he was going to be dying soon, and I know that that conversation occurred in April of '94. I remember that specifically.

* * *

[p.728] Q. Was Mr. Deegan a peer of yours?

A. He was -- he and I were law school classmates, and then worked together at -- for a period of time at the District Attorney's Office, yes.

Q. You started about the same time at the office as Mr. Deegan or he was there before you?

A. No, he was there before me.

Q. Maybe Mr. Aaron was anticipating my question. Can you tell us, sir, what training you had at the DA's Office --

MR. AARON: Objection, Your Honor, outside the scope of direct.

MR. BANKS: Your Honor, I believe this is a subject that this witness as an Assistant District Attorney can talk about rather than us calling him.

THE COURT: Yeah, you have a right to call him back in rebuttal, if necessary. Both sides have listed Mr. Riehlmann as a possible witness, so I'm going to overrule the objection.

EXAMINATION

BY MR. BANKS:

Q. Mr. Riehlmann, tell us what training you had with regard to a prosecutor's obligation under *Brady* during the entirety of your time at Mr. Connick's District Attorney's Office.

A. Well, training, I mean, I guess that could encompass a number of things, but mainly at Mr. Connick's office you were trained on the job.

[p.729] Q. Meaning, I'm sorry, I didn't mean to cut you off, sir.

A. You were trained on the job. You were put in a courtroom with a more experienced attorney, and then as you were able to handle yourself, you were given more responsibility. Initially, you weren't given much responsibility at all.

To answer your question specifically as it relates to *Brady*, I don't recall that I was ever trained or instructed by anybody about my *Brady* obligations, no.

Q. There were some gray areas under *Brady*, right, as to what was -- what you were required to produce and what you weren't required to produce?

A. I never thought so, no.

Q. Did you have any reason to believe that your friend, Mr. Deegan, had any more training than you did on *Brady*?

A. I couldn't speak to that because he was there for a year or so before I was.

Q. Now, when you met with Mr. Deegan and he told you in the time shortly before his death that he had suppressed evidence, did he say anything about whether or not Mr. Dubelier was involved in that?

A. No. He might have, but I don't recall that he did.

Q. So at least at this point, you can't say whether Mr. Dubelier was involved or wasn't involved?

A. No, I cannot.

Q. And the same with Mr. Williams, can you say based on what [p.730] Mr. Deegan told you whether Mr. Williams was involved or was not involved?

A. No, I cannot.

Q. I think you said this whole thing surfaced, your affidavit and the statement you gave us as a result of Mr. Whittaker sharing with you that Mr. Cooney and I had talked to him; is that right?

A. That's correct. That's correct.

Q. And then you volunteered to Mr. Whittaker something that you remembered from your prior discussion with Mr. Deegan?

A. That's correct.

Q. And you said you were Mr. Whittaker's partner and good friend?

A. Correct.

Q. Now, at this point, had Mr. Whittaker told you that the blood report that we had shown him was addressed to him; namely, on the top of the blood report it said to Assistant District Attorney Bruce Whittaker?

A. I don't remember if he told me that or not.

Q. You learned that at some point, though?

A. Yes. I guess I surmised that that is why you and Mr. Cooney went to speak to him because it was his name on --

Q. So at the stage that Mr. Whittaker told you about it, did you think maybe he was in some potential trouble for failing to turn it over?

[p.731] A. No, I never thought that.

Q. Had you heard anything else at that point about what Assistant District Attorneys had seen or not seen the blood report?

A. No.

Q. The only thing you knew at that point was that the blood report was addressed to your partner and friend?

A. I believe I knew that.

Q. And when you prepared this affidavit, this indicated that at least that Mr. Deegan was to be assigned some fault or responsibility in connection with the failure to produce blood evidence or the blood report or something?

A. Yes.

Q. Mr. Deegan didn't tell you specifically about a blood report as opposed to blood evidence, did he?

A. I don't remember exactly what he said. All I know is that whatever it was that Bruce told me in our

conversation triggered the memory I had of the other conversation with Mr. Deegan.

Q. I will represent to you that Mr. Whittaker has testified in this court that he took the blood report that he got and he put it on Mr. Williams' desk. Do you know whether that's true or not?

A. I've heard him testify to that.

Q. But you don't have any independent knowledge?

A. No, I don't.

[p.732] Q. You don't know whether it ever made its way to Mr. Deegan?

A. No. I wasn't even in the office then.

Q. You don't have any reason to believe, for example, that Mr. Deegan would have taken it off of Mr. Williams' desk?

A. I would have no reason to believe that.

Q. In assigning some responsibility to Mr. Deegan who was deceased, did this take some of the pressure off of your friend and partner, Mr. Whittaker?

A. I never considered him to be at fault or to have any pressure on him. I don't know that I could answer that question. How I can answer that question.

Q. When Mr. Whittaker approached you and you told him about this, did he suggest that you come forward to Mr. Cooney and me to give us this information?

A. He did, but it was my recollection it was more out of a sense that you could have this information and it ought to come to light and not -- but, yes, to answer your question.

Q. He also had information in 1985 and he didn't do anything to bring it to light then, did he?

A. I don't know what he did then.

Q. What's your practice now, sir?

A. I would say it's 95 percent criminal defense.

Q. You represent criminal defendants routinely?

A. I'm a public defender in Jefferson Parish and I've worked here in federal court on, as an attorney for indigent defendants.

* * *

[p.736] All right. You can call your next witness.

MR. AARON: Mr. McElroy.

THE DEPUTY CLERK: Mr. McElroy, please raise your right hand.

TIMOTHY McELROY

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: My name is Tim McElroy or Timothy, Tim McElroy, M-C-E-L-R-O-Y.

DIRECT EXAMINATION

BY MR. GOINS:

Q. Mr. McElroy, how are you presently employed?

A. I am the chief of trials for the Jefferson Parish District Attorney's Office as a prosecutor.

Q. Have you always held that position?

A. No.

Q. And what position did you hold prior to being the chief of trials?

A. I was a chief of the Screening Division in District Attorney Paul Connick's office in Jefferson Parish.

Q. When did you first go to work for Mr. Connick, for Paul Connick in Jefferson Parish?

A. I began the day following Mr. Harry Connick's at the last -- the last day of Mr. Connick's term, I started the very next day at District Attorney Paul Connick's office.

[p.737] Q. And the Mr. Connick you're referring to is Mr. Harry Connick?

A. I am.

Q. Which position did you have on the last day of the term of Mr. Harry Connick?

A. I was District Attorney Harry Connick's first assistant.

Q. When did you first go to work for Mr. Harry Connick?

A. I began work as a law clerk in District Attorney Harry Connick's office in or about the summer of 1983.

Q. And then when you graduated from law school, did you go to work for the District Attorney's Office?

A. Actually, when I graduated from LSU Law School in 1977, my first job as a lawyer was to return home to Houma. My home is Houma, where I grew up in Terrebonne Parish, and I began work for District Attorney Norvel Rhodes in 1977.

Q. When you first went to work for the Houma District Attorney's Office, were you given any training?

A. In the Houma District Attorney's Office? Yeah. My training was to be with Jim Alcock.

Q. Did you have any formal training?

A. I -- really, the word "formal" training for me is, you'll have to -- ask me what you mean.

Q. In a classroom?

A. Classroom instructions?

Q. Where the only thing you're doing is being trained on a [p.738] subject matter that has relevance to the work that you perform?

A. I did not in District Attorney Norvel Rhodes' office, I did not ever have a classroom presentation other than annually the Louisiana District Attorneys Association and most District Attorneys' Offices, if not all of them, are members of the Louisiana District Attorneys Association host -- I think at that time it might have been an annual educational seminar. So in terms of formal classroom podium presentations, I did go to the Louisiana District Attorneys seminars in 1977, '78, '79.

Q. This is before you went to work for District Attorney Harry Connick?

A. Oh, yes. I went to work for District Attorney Harry Connick in the summer of 1983.

Q. What types of subjects were addressed in the Louisiana District Attorneys training?

A. Oh, every variety of subject.

Q. Then let's shorten this. Was the subject of *Brady* disclosures ever addressed in the Louisiana District Attorneys training?

A. I have to tell you, I cannot recall specifically what the topics of instruction were in 1977 and '78 and '79. Nor for that matter, when I returned to the work as a prosecutor in 1984 and then through now, today, I cannot tell you at any one of those seminars and I go almost annually if at every session there was a *Brady*,

but *Brady* in a prosecutor's world is something you study [p.739] all the time.

Q. Have you ever been a presenter at those seminars?

A. Yes. I've taught at those seminars.

Q. Now, you said that you joined the Orleans Parish District Attorney's Office, Harry Connick's office in 1983 as a law clerk; is that right?

A. I did.

Q. Did you ultimately become an Assistant District Attorney?

A. Oh, yes, I was sworn on my birthday in 1984.

Q. And what position -- what was your job description and job duties when you first assumed the position as the Assistant District Attorney with Harry Connick's office?

A. In District Attorney Harry Connick's office, the typical program was to employ the newer assistants in what we refer to as "support units," that is, where you are prosecuting cases before a judge alone and not a jury so that you can learn how to marshal evidence, we call it "marshalling evidence," which is to say, you learn how to -- what evidence do I need to identify, how do I introduce it, when do you object, how to direct exam, how to cross-exam. Trial techniques. After you become aligned in those areas, you're then assigned to the, what we would call the "Felony Division," the "Trial Division" where you then begin working with a partner in a section of court in which like Judge

Barbier's court here where there will be a jury seated, you will be at the table with another prosecutor, lead prosecutor and [p.740] co-counsel.

So the question was, where did I begin? I began in the Appeals Division. Because I had previous prosecutor experience and they needed me in the Appeals Division. I then moved to the Magistrate Division. I then went directly into trials fairly quickly.

Q. Let's slow down. When did you go into trials?

A. I went into trials -- if I was sworn in January of 1984, I believe I went into trials as early as February or March of 1984.

Q. So you didn't stay in the other two divisions very long?

A. No, I had been a prosecutor in the other office as I mentioned.

Q. And when you went into the trials, the Felony Trials Division –

A. Yes, sir.

Q. -- were you a junior?

A. Yes, sir.

Q. Or a senior?

A. I was a junior.

Q. And what were the responsibilities of a junior?

A. The junior is the grunt. The junior is the go-to person. The junior is the you've-got-to-learn-what-to-do person. Call this witness, line up that police officer, go check the evidence, see whether or not the police officers are available. In other words, the junior basically learns how to put a case together [p.741] under the direction of a senior assistant. In fact, it's an internship. The junior can also, if the senior believes, the junior can also assume leadership in some trials. Such as relatively simple prosecutions, a police officer in a narcotics case where there is a professional witness, a police officer, these kinds of simple cases. As the cases become more complex, the cases are -- the senior prosecutor in the court would be responsible for those.

Q. And so you were supervised by the senior?

A. As a junior, I was supervised by the senior.

Q. And is it fair to say that you received your training from the senior?

A. Every day. Every day.

Q. Did you --

A. Every waking, every hour.

Q. Did you ultimately become a senior?

A. Yes.

Q. And when did you become a senior?

A. I really cannot tell you when I became a senior. Again, I moved relatively quickly through Mr. Connick's office because I had had experience as a prosecutor in another office and I had prosecuted major cases in 1977 and '78 and '79. So once I had done a run as a junior assistant and learned about the Orleans process in selecting jurors and preparing witnesses and pretrying cases, I became a senior relatively quickly.

[p.742] Q. Were you a senior in the April, May to June time frame in 1985?

A. In '85? Definitely. Definitely.

Q. And then what position did you attain after being a senior?

A. In about 1987, I was selected to become the deputy chief of trials.

Q. Did you skip over any positions when you became the deputy chief of trials?

A. No. I was making progression into management. I had become, I had been a junior assistant, I had become a senior assistant, and at that point, by having been appointed to be deputy chief of trials under Bridget Bane, I was beginning a management track. So I would say in 1987, I was tapped for management and I have been in management for virtually 20 years as a prosecutor.

Q. Which position did you attain after the deputy chief of trials?

A. In 1988, the following year, I was made chief of trials.

Q. Did you at any point in time have any supervision or responsibilities for the screeners that worked in the office?

A. Yes. In 1990, I became the chief of screening. I moved from trial chief to screening chief, which is a completely different division in the office.

Q. What is the responsibility and function of the screeners?

A. The screeners, under the Harry Connick organization, were [p.743] supposed to be your most experienced attorneys in the office. Their responsibility was to take a police report, review what the police officers accused the citizen of doing, determine whether or not the evidence was lawfully seized, whether or not the offense occurred in the jurisdiction, in this case in Orleans where I worked, whether or not all of the evidence was complete, and most importantly, whether or not the evidence was provable beyond a reasonable doubt, which is in a criminal case what the burden of the prosecutor is to prove their case beyond a reasonable doubt. Screeners make those decisions on every arrest.

Q. Did the screeners play any role in the analysis of *Brady* issues?

A. Every District Attorney, every District Attorney has a role in the analysis of *Brady* determination. Every Assistant District Attorney.

Q. After heading the Screening Division, what did you do next?

A. Well, I did that for about a dozen years. And then after Camille Buras was elected to the criminal court bench, I succeeded Camille Buras who was elected to the bench and I became the first assistant to District Attorney Harry Connick.

Q. Were there many Assistant District Attorneys who were elected to the bench under Harry Connick's administration?

A. There are like 12 sitting judges and I know of least five who had served in Harry Connick's office and some of them as [p.744] first assistant. And, yes. And several other judges on that bench, I served with as Assistant District Attorneys who are criminal court judges.

Q. How long were you the first assistant?

A. Camille was elected in 1998. I took -- therefore, when she assumed the bench, I took her job as first assistant in October of 1998.

Q. And then when did you leave that position?

A. The day District Attorney Harry Connick left office, I left office.

Q. That was in 2003; is that correct?

A. That was January 13, I think, 2003.

Q. So you were in the District Attorney's Office for 20 years, 1983 through 2003; is that correct?

A. Actually, I think it's 19 because I'm starting to work my retirement out. So I was there about 19 years in District Attorney Harry Connick's office. I've been in Paul Connick's office four years.

Q. And you worked your way from the bottom of the ladder to the top of the ladder at the District Attorney's Office; is that correct?

A. Yes. Yes.

Q. To the best of your knowledge, what was the scheme or process that was in place in the District Attorney's Office for addressing the issue of *Brady* evidence, uncovering and disclosing [p.745] *Brady* evidence?

A. That's a very broad question. In what respect are you asking me, in the screening process, where a screener looks at the -- there is many, many processes. Every time a District Attorney who has a separate oath, reviews a file, whether you -- the first District Attorney to do that is a screening attorney. They'll review a file to determine whether or not there is exculpatory evidence, which there is a lot of law in this, but it means anything in a prosecutor's file which is favorable to the man who has been arrested, the woman who has been arrested, the accused. The screeners do that first.

If the screener finds *Brady* material, the screener is required to report that by calling someone or refusing the charge. Or the screener can note that on

a Screening Action Form, a form designed to follow the file, and forward an accepted case on to a trial attorney.

If a screening attorney makes a decision that the evidence is there and he believes a case can successfully be prosecuted beyond a reasonable doubt, the screener accepts the case, the Clerk's Office allots the case and it goes to a trial attorney. That's the second review for exculpatory material.

In Harry Connick's organization, there are three team members in every court, an investigator, who is typically a New Orleans police officer retired, reviewed the file. Then the junior assistant, which I have described reviewed the file. Then [p.746] the senior assistant. So there are three more individuals reviewing. Now, they are not just looking for exculpatory material. They are learning the file. Part of learning the file is reviewing whether or not there is information in the file that can be favorable to the accused.

Q. Let me stop you there. If either, let's start with the junior. If the junior had a question with regard to *Brady* evidence, looking at information, and could not determine for himself whether or not the evidence that he was looking at needed to be disclosed to the defendant, what could the junior do to resolve that issue?

A. What must the junior do? And junior Assistant District Attorneys really should not make a decision. A junior assistant is there in design to take that question to the senior attorney who is the instructor, and the lead attorney. So a junior assistant must

identify it and present the question to a senior assistant. And the senior assistant will make that determination.

Q. Now, the initial screen begins with the screener?

A. Yes.

Q. And is the screener more experienced than the senior?

A. It was not always so. We tried to make that so. What Connick's office, the way Connick prepared the office chart was to have very experienced people.

MR. COONEY: Your Honor, can I interpose an objection? [p.747] Mr. McElroy was in this office twenty years. I don't think we have any time frame, we're talking about different times here. I think it's very confusing if we don't have a time frame on this.

THE COURT: Yeah, I sustain that. I think you need to pinpoint when you're talking about.

EXAMINATION

BY MR. GOINS:

Q. Mr. McElroy, did the procedure that you first experienced when you went to Mr. Connick's office with regard to screening, did that procedure stay the same?

A. What I have described for you is at '84 and '85. Those are my personal experiences. It's not what I read. I was there. The screeners in --

Q. Excuse me.

A. Go ahead.

Q. Did the process change over time?

A. No.

Q. Was there any element added? Was there any element of formal training --

A. Oh, there were several.

Q. -- added at any point?

A. There were several elements added over the years. But I'm telling you what was in '84 and what maintained. Many things were added, yes.

Q. So is it fair to say that the description you're giving now [p.748] is the minimal process that existed when you first went to work for Harry Connick?

A. '84?

Q. 1984.

A. That's correct. And maintained throughout.

Q. And as time went by, additional elements were added?

A. Right. But nothing was subtracted.

Q. So it became more sophisticated as the time went by?

A. And you asked me the question of whether or not experienced persons were in screening. My answer is, if at all possible we took the experience, once you finish as a senior assistant as I've described for you, and you didn't make the management track like I was lucky to do, you would typically go into the screening function. Because then you could -- you weren't in court every day getting beat up. You were reading police reports and talking to police officers and civilian witnesses and asking them questions. So after you were a senior attorney and you prosecuted so many cases every day you were in court, what Mr. Connick's organization required is that you then went to a screening function and you reviewed cases. So that was, that was ideal. It wasn't always true. We didn't always have all the screeners being senior assistants. But that's what our ideal was.

Q. So the first take was the screeners and then the next take is the juniors. If the senior --

[p.749] A. I'm sorry. The next take is the police officer assigned to that court. And then the junior.

Q. Now, the junior would go to the senior. If the senior had a problem, where would the senior address his issues? Or her issues?

A. The senior assistant in each court had to pretry every case. The senior assistant in every court had to pretry. Whether you had a problem with the case or not. You had a responsibility to pretry. That is, to talk out the problems and the issues with your trial chief or with your deputy trial chief. So senior assistants went to deputy chiefs or trial chiefs.

Q. Was the junior present?

A. Yes.

Q. With the senior when the --

A. I assure you.

Q. -- when the two of them went to the pretrial?

A. I assure you no senior would go into a pretrial without a junior because all the work that the chief gave the senior would be delegated by the senior to the junior.

Q. Was there anyone else present in the prescreening other than the chief?

A. I'm sorry. Could you repeat that.

Q. In the pretrial --

A. Yes.

Q. -- and I probably misspoke, in the pretrial other than the [p.750] chief, the junior, and the senior, were there any other individuals that would participate in the pretrial?

A. No, it was a junior assistant, the senior assistant and the deputy chief on some occasions, and the trial chief. If the assistants wanted a reduction on a case, the reductions would go directly to the trial chief, because only the trial chief could reduce cases. So if a deputy chief could pretry with the senior and the

junior, but the trial chief had to pretry reduction requests or dismissal requests.

Q. What role, if any, did the pretrial play in the unearthing of *Brady* material?

A. A closer examination of what exactly -- this is what pretrials were. What's the theory of your case? How do you intend to prove it? Who are your witnesses? Have you talked to them? Have you gotten discovery from them? Did you ask for discovery from them? Do you have information that is favorable to the accused? Have you been through any statements from the defendant that you have to advise the defense attorney about? Statements, evidence, statements from the defendant, evidence taken from the defendant are matters that have to come before the judge alone. You want to make sure those matters are handled and the judge has ruled on that before you call a jury.

Q. Were there any other processes or checks and balances in existence in District Attorney Harry Connick's office in the 1984-1985 time frame other than the ones that you've just told [p.751] the jury about?

A. I told you about the LDAA function, the seminar. There were trial meetings. This is a very important training, since, again, I'm not sure exactly what the formal training question is. This would be -- this would be all the trial attorneys meeting on a regular basis -- weekly basis with the trial chief. Reviewing for the whole, there were ten sections of court in 1984. They added two more criminal courts since then. But there were ten criminal courts, so you would have at or about 20 attorneys. They would be all gathering

around and that's when you would share what happened this week. What cases went to trial. You would, it was very collegiate. This is where you exchanged information.

There were also, and this is a very important piece of this, examination for *Brady* because that's where you continue to ask me, the chief of the Appeals Division in District Attorney Harry Connick's office was responsible for reviewing all most recent decisions, you would think so. Whenever the appellate courts issued opinions, the chief of appeals would have to digest those opinions and would send out the opinions to the chief staff, chief staff. The chief of all the different divisions. Sometimes those opinions didn't require any further discussion from the chief of appeals. Sometimes it took the chief of appeals to come in and tell us what they meant, describe for us and educate. Sometimes the chief of appeals would teach, Bill [p.752] Campbell, just recently died, was the chief of appeals when I was in the Trial Division. And Mike McMahon, who is the U.S. Attorney here would come and lecture us from a chief of appeals position. On those occasions where it was necessary. Otherwise, chief staff would disseminate those opinions to people who worked under them.

Q. Now, would those opinions to the best of your recollection, include analyses of cases that involved *Brady* material?

A. Of course. Of course. *Brady*'s only an aspect, a very important aspect of a prosecutor's responsibility. Another part of it is was were there statements from the defendant that were properly taken? Was it properly advised? Was there evidence taken from the

defendant? In a legal way, was it legally seized. So there were many areas in which, in prosecution, and in criminal law you have to remain abreast.

Q. So you provided us with a number of processes, checks and balances designed to analyze *Brady* material. Were there any others than the ones that you've just provided us with?

A. We're still talking in that time frame in which I am an Assistant District Attorney, 1984, '85, '86, '87. '88 I am trial chief. '89 I am screening chief. Yes. We added more. As the decisions from the U.S. Supreme Court began focusing on exculpatory information, we added more instruction on exculpatory.

Q. Did you ever add any formal training? In the classroom [p.753] training by an instructor standing up, providing instruction with regard to *Brady*?

A. Yes.

Q. And when was that added?

A. Well, the best of my recollection, somewhere, we began our CLEs in our office sometime in the '90s. Before we began our instruction in the office, continuing legal education, I'm sorry, in our office, before the State imposed a requirement on members of the bar to have CLE, 15, I think we have 15 units you're required to take, so we began instructing in our office. Bridget Bane might be able to tell you better, but I, I remember the class instruction became more frequent. And I cannot tell you a specific year when it became more frequent.

Q. Was there ever a policy enunciated by the District Attorney himself, Harry Connick, with regard to *Brady* material?

A. Again, I want to speak to policy, because as lawyers we've talked about this. There were memoranda on a regular basis regarding different issues. *Brady* is certainly one of them.

Q. This is in the '84, '85 time frame?

A. Yes. At some point around 1987, my best recollection because I was working with Bridget Bane as her deputy chief, we compiled all the memoranda from all -- the trial chapter alone is like 30 pages, 25, 30 pages dealing with various trial issues. And the *Brady* policy that we had prior to when we put it in a booklet form in 1987 was made a part of that booklet in 1987, [p.754] which we called our office policy manual. We published it in 1987. I remember that because I was a deputy chief and I helped Bridget put all the memoranda from all the different locations together.

Q. And what was now, that -- the policy that was instituted in 1987, was that the first time that a policy was enunciated by District Attorney Harry Connick to the best of your recollection?

A. It is my recollection. It was not the first time.

Q. And when was the first time that you learned of a policy that had been enunciated by the district attorney?

A. When you walk in the door. When you walk in the door. 1983 I began as a law clerk. '84 I'm in appeals for a short while in magistrate. You're instructed on *Brady* from the very beginning when you take your oath as a prosecutor.

Q. Other than -- and what exactly was that policy to the best of your recollection?

A. Well, the one that is codified said that *Brady* is a -- *Brady* is a Supreme Court decision from the '60s which refers to an entire body of work. There is a line of cases that continued to define what the Courts mean when they say reveal to the accused exculpatory. What does that mean? Exculpatory, evidence that is favorable to the accused. So when we talk about *Brady*, we're talking about a continuing progression of cases. You're exposed to that progression of cases the minute you start working in a District Attorney's Office.

[p.755] Q. And, again, can you tell us what the policy was?

A. That anything favorable to the accused was disclosed. That if the information was -- frankly over time it began to develop into different tests -- if the information is impeachment information, that is where a witness could take the witness stand and be asked questions that would be damaging to the State's case, impeachment, that information then became *Brady* material. And that, I remember from the very beginning, it was codified in the policy manual as Article 5.2 something, I remember. And we defined it there specifically saying if -- you should review your files for exculpatory information. If you are not certain, you should seek guidance. If you're not certain from

the guidance you've got, then you need to ensure that those matters are completely talked about. Whether or not our policy at the time, as it's written, required you to go to a judge, I don't quite remember because I don't remember it verbatim.

Q. Was there ever a policy that the District Attorney had in the '84 through '85 time frame of withholding *Brady* material?

A. A policy of withholding?

Q. That's correct?

A. No. Never.

Q. Were there any other policymakers, to the best of your knowledge, and now we're talking about throughout the entirety of your time frame because you began at the bottom and worked your way all the way up to the top and you became first assistant, so [p.756] were there ever any other policymakers in the District Attorney's Office other than Harry Connick?

A. Never. I've worked in three District Attorney's Offices. There is one policymaker in the District Attorney's Office. There are first assistants of chief prosecutors whose job it is to report to the District Attorney that there is this problem, the District Attorney, particularly this District Attorney will say, and what are you doing to address it. Well, this is what we're going to do. We're going to write this, we're going to come to you, we're going to show you what it is we intend to teach. So he relies on -- this man relies on his first assistant to tell him what the problem is, create a policy, bring it to him, he looks at it, talks to

you, blesses it and then it's incorporated into office practice. There is a policy and then there is a practice. The practice is to implement the policy. Sometimes the practice failed to implement the policy.

Q. During the time frame when you were a first assistant, I mean, a second and then a first, were you ever at any point in time instructed by any supervisor to disregard *Brady*?

A. By a second? I'm sorry.

Q. By any supervisor, whenever you were either a first or a second.

A. Oh, you mean a junior or a senior?

Q. Junior or senior.

A. First is reserved for the first assistant. Sorry about [p.757] that.

Q. I misspoke. I apologize.

A. The junior or senior assistant -- what was the question?

Q. Was there ever a point in time when a supervisor instructed a junior or a senior to disregard -- instructed you to disregard *Brady*?

A. It never happened. It never happened to me. I never heard it. I never heard it. And I would have.

Q. What was Harry Connick's attitude towards training when you first went to work for the District Attorney's Office, to the best of your knowledge?

A. I know Harry very well. He's not just my former employee -- employer, he's my friend. It is one of my blessings to know this man. Harry was very energetic, very innovative and training was a very important part of what he did. In fact, training was a very substantial part of Harry's office.

MR. GOINS: Your Honor, I'm at a point where I'm going to shift gears into the *Thompson* case and to what took place in the 1990s and it's 5:25 or so. This will take a little while. Do you want to -- would Your Honor wish that we stop at this point in time?

THE COURT: How much more do you have to go?

MR. GOINS: I probably have at least another 30 to 45 minutes, Your Honor. At least 30 minutes.

THE COURT: All right. We'll recess for the evening

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[caption omitted in printing]

THURSDAY, FEBRUARY 8, 2007, 8:30 A.M.
VOLUME IV
TRANSCRIPT OF TRIAL PROCEEDINGS
HEARD BEFORE THE
HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

* * *

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* * *

[p.785]

* * *

Q. Yesterday you testified that you're presently employed by Jefferson Parish, the District Attorney's Office there. Does Jefferson Parish have any formal training?

A. Yes.

Q. And what is that formal training that they have?

A. Very much like what Mr. Harry Connick's office. There are [p.786] meetings, continuing legal education, pretrials.

Q. And you view that as formal training?

A. That is formal training. Now I have to expand on this, Your Honor.

THE COURT: Go ahead.

THE WITNESS: Formal training, I'm a little perplexed because we keep using that term, but there is no more formal training than one-on-one. I mean, I don't know if that's formal or informal, but we view our teaching as one-on-one as better than classes. We do one-on-one. Our instruction is one-on-one. And I consider that training, formal or otherwise.

MR. GOINS: I have no further questions, Your Honor.

THE COURT: All right. Mr. Cooney.

MR. COONEY: Your Honor, may I approach?

THE COURT: Sure.

CROSS-EXAMINATION

BY MR. COONEY:

Q. Good morning, Mr. McElroy. I'm just handing you some documents that may be used during your examination. Thank you.

A. Good morning, Mr. J. Gordon Cooney.

Q. My friends call me Gordon, but thank you.

A. Good morning, Mr. Cooney.

Q. Mr. McElroy, you've testified for a bit this morning about the Grand Jury investigation; is that right? And I believe you testified that you led that Grand Jury investigation, am I right [p.787] about that?

A. That's correct.

Q. Would you describe the efforts that you made with regard to that Grand Jury investigation as thorough?

A. Yes.

Q. This was a serious matter?

A. I think the most serious matter I have handled in my 20-something years.

Q. And you identified some so-called targets, I think; is that right?

A. That's correct.

Q. And I think you mentioned that Mr. Dubelier was a possible target; is that right?

A. He became one.

Q. And Mr. Williams was a possible target?

A. That's correct.

Q. And Mr. Whittaker was a possible target?

A. Right.

Q. And Mr. Riehlmann was a possible target, am I right?

A. That's correct.

Q. And I think you said that you handled the interactions with those gentlemen as part of this investigation, am I right about that?

A. That's correct.

Q. And would you say that you conducted a thorough [p.788] investigation of them?

A. Yes.

Q. How long would you say your discussions with Mr. Dubelier lasted?

A. I don't remember meeting Mr. Dubelier.

Q. You spoke to him over the phone?

A. I don't remember talking to Mr. Dubelier.

Q. Did you conduct a thorough investigation of Mr. Dubelier, sir?

A. I don't remember talking to Mr. Dubelier.

Q. Well, if you -- you don't remember talking to him at all?

A. No.

Q. So how could you do a thorough investigation of what Mr. Dubelier did without talking to him?

A. Because I learned -- this is the whole truth -- because I learned about Mr. Dubelier's participation in the armed robbery was, in fact, filing one document, which was a legal pleading, a discovery, as we call them. And from what I learned, and from what I knew from discussions by other lawyers with Mr. Dubelier, that that did not put him in the prime suspect seat.

Q. Now, were you aware he was the special prosecutor when the case was filed in the armed robbery case?

A. Now, what time frame? Because we have several time frames.

Q. When the armed robbery case was initiated in 1985, are you aware that he was the special prosecutor in the armed robbery [p.789] case?

A. My answer is, in 1999, when I began reviewing the 1985 armed robbery, one, my review included the Screening Action Form by Mr. Bruce Whittaker. On that Screening Action Form, Mr. Whittaker had written, Eric Dubelier, special prosecutor. And whether or not that meant Dubelier was special prosecutor on the armed robbery or on the murder, I do not know.

Q. And with regard to the pleading that you said he signed, am I correct that he signed a discovery response in the armed robbery case that was dated only eight days before the armed robbery trial? Does that sound right based on your recollection?

A. I hesitate to do days. I recall from having seen these documents so often that Mr. Dubelier filed the answers in the armed robbery case either the 2nd or the 3rd of April. I also recall that the case was scheduled for prosecution on April 10th, but the judge moved it back a day because the defense attorney requested a day. So whatever time that is.

Q. Mr. McElroy, if Mr. Dubelier testified in his deposition that as part of your thorough investigation of this matter, you spoke to him for about five minutes on this matter, would you have any reason to doubt that as being correct?

A. Not at all.

Q. Now, the investigation that you were doing, did it concern just the armed robbery case or did it also concern the murder case?

* * *

[p.793] Q. Mr. McElroy, what is circumstantial evidence?

A. Circumstantial evidence is that evidence which tends to convict. Assuming that the State can exclude every reasonable hypothesis of innocence.

Q. What's the difference between circumstantial evidence on the one hand and direct evidence on the other hand, Mr. McElroy?

A. Direct evidence is evidence that directly accuses and convicts. Circumstantial evidence requires a level of pointing an arrow in a certain direction and hoping

that the jury will connect that, the totality of which presents a case beyond a reasonable doubt. In criminal cases.

Q. Am I correct that the Orleans Parish District Attorney's Office prosecutes cases, some cases are based exclusively on circumstantial evidence?

A. Yes.

Q. Mr. McElroy, am I correct that you started in Mr. Connick's office, Mr. Harry Connick's office in 1984?

A. That's correct. Actually, no. You're incorrect. I began in 1983 as a law clerk as I said yesterday.

Q. But you started as an Assistant District Attorney, I stand corrected, in 1984?

A. That's correct.

Q. And so when the John Thompson prosecutions took place in 1985, you were a relatively new prosecutor in that office?

A. In that office, that's right. Forgive me. I had literally

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[p.796]

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BY MR. COONEY:

Q. Now, Mr. McElroy, am I correct that you didn't have a management role at the Orleans Parish District Attorney's Office until about 1986 or 1987, when you became the deputy chief of trials?

[p.797] A. That's correct.

Q. And you didn't become the first assistant until 1998; is that right?

A. That's right.

Q. And that was well after Mr. Thompson's murder trial?

A. That's correct.

Q. Now, you spent 19 or 20 years at the Orleans Parish District Attorney's Office, am I right about that?

A. That's correct.

Q. And you left when Mr. Connick left office in early 2003?

A. That's correct.

Q. And at that time you went over to work for Mr. Paul Connick, who is the District Attorney of Jefferson Parish?

A. That's correct.

Q. And am I right that Mr. Paul Connick is Harry Connick's nephew?

A. That's correct.

Q. You were Harry Connick's right-hand man for many years before the two of you left the office here in New Orleans, am I right?

A. I was one of his senior counselors, one of his senior advisors, yes, sir.

Q. And am I right that he is a dear and personal friend of yours?

A. Very dear and personal friend.

[p.798] Q. And yesterday, I think you said it was a blessing to know him?

A. Every day, what I said is, I considered a blessing to have his friendship. It is.

Q. And would I be right that you would do just about anything to help him out?

A. No. You would be wrong, and I know that question from having asked it many times before. My first loyalty is to my oath now as a witness, my oath as an attorney and my oath as a prosecutor. And if -- well, I don't want to answer your next question, but I will tell you, I've had many fights with my dear friend, and we have disagreed, but I consider him all the more my dear friend after the fight.

Q. Now, yesterday I think you testified that in the 1984, 1985 time frame, someone in the office would send out memoranda on legal issues to the various assistants and some of those memoranda might include *Brady*?

A. Yes, I did. I said it was typically the point for that would have been the chief of appeals. Because the decisions from the high court are obviously coming through our appeals division and being processed after throughout.

Q. And I believe you also testified that the 1987 policy manual was compiled by assembling all of those memoranda that had been issued on the various legal issues over the years?

A. That's correct.

[p.799] Q. Okay. Can we ask you to take a look, please, at Exhibit 51, which is in your binder and Mr. Vincent, would you be good enough to put that up for the jury, please.

Mr. McElroy, is that a copy of the 1987 Orleans Parish District Attorney's Office policy manual?

A. Well, it's a -- it appears to be, yes.

Q. And am I correct that that's the earliest written policy manual of which you're aware?

A. Yeah. I even have my name on it and it says on the title page Policy Manual Book Number 7, dated February 1, 1987.

Q. And that is the earliest manual of which you're aware, correct, 1987?

A. That's correct.

Q. That's two years after the Thompson prosecution?

A. That's correct.

Q. Let's take a look at Section 5.25 if we can and see what that says.

A. Okay.

Q. Mr. Vincent, if you could pull that up, I would appreciate it.

Am I right, Mr. McElroy, this is the section of the policy manual that deals with *Brady* material?

A. It's titled *Brady* material.

Q. Are you aware of any other section of the policy manual that refers to *Brady* material?

[p.800] A. Not specifically as *Brady* material. However, in answer, in the whole truth, there are many sections that deal with pretrials and consultation, which, of course, as I explained have to do with an explanation of *Brady* material.

Q. This is the section of the manual that talks about *Brady*?

A. That's right. It's labeled pretrial *Brady* material.

Q. And it's one paragraph long; am I right?

A. That's correct.

Q. Four sentences?

A. Well, I don't know how many sentences.

Q. We can count them. In the first sentence, it says, "In most cases in response to the request of defense attorneys, the judge orders the State to produce so-called *Brady* material. That is information in the possession of the State which is exculpatory regarding the defendant."

I want to examine that sentence for a second.

A. Sure.

Q. Is it your understanding, Mr. McElroy, that the *Brady* obligation that a prosecutor has is limited to situations where there is a request of defense attorneys?

A. That is no longer true.

Q. And is it your testimony that that was true in 1987?

A. The specific year that the courts may have ruled that it is no longer a requirement for a request, I don't know the year. But it is no longer true. There is no need for a defense to [p.801] prompt for exculpatory material.

Q. Because the prosecutor has an obligation to turn over favorable evidence regardless of whether the defendant asks for it?

A. Unquestionably. Unquestionably.

Q. And am I correct that the prosecutor's obligation to turn over *Brady* material is not dependent upon a judge ordering the State to produce so-called *Brady* material?

A. That's correct.

Q. And am I also right that the *Brady* obligation goes beyond mere exculpatory evidence?

A. Yes, it includes impeachment evidence. That is, of course, a line of cases that define this. I think the impeachment may have been post 1987, but I don't have my notes. I don't know that.

Q. Would you recall that the *Giglio* case addressed that, Mr. McElroy?

MR. GOINS: Your Honor, at this point in time I would like to object to --

THE COURT: Overruled.

THE WITNESS: I would have to see the *Giglio* case.

EXAMINATION

BY MR. COONEY:

Q. And you don't remember *Giglio*?

A. Well, I remember it by name, but I would have to see it.

[p.802] Q. You don't remember what it held?

A. Not specifically at this moment. If I'm going to be questioned on it, if you want to show it to me, I would be delighted to read it and tell you what I think it holds.

Q. Do you recall it was a case in the Supreme Court of the United States at least?

A. Yes, sure. In fact, the federal attorneys refer to *Giglio* all the time. We call it *Brady*. The federal authorities call it *Giglio* impeachment evidence.

Q. Would you agree with me that, and let's go --

A. And what year was *Giglio* decided?

Q. 1972, sir.

A. Okay.

Q. Let's look at the third paragraph of the document. The third sentence of the document. The third sentence says, "Failure to produce *Brady* materials has resulted in mistrials and reversals, as well as extended

court battles over jeopardy issues." Do you see that sentence?

A. Yes.

Q. Is there anything in this paragraph that talks about the impact on the constitutional rights of a criminal defendant if *Brady* material is not produced?

A. The whole paragraph speaks to the impact of the constitutional rights of a defendant.

Q. Correct me if I'm wrong, Mr. McElroy, what I'm looking at [p.803] here is mistrials, reversals, extended court battles over jeopardy issues. Am I not right that what that's focusing on is transactional burden imposed on the District Attorney's Office?

A. Transactional burden imposed on the District Attorney's Office?

Q. The difficulty associated with having to retry a case, extending court battles, is there anything in here that talks about, that talks about the impact on the criminal defendant?

A. Mr. Cooney, the entire paragraph addresses the rights of the accused. When we speak in terms of mistrials and reversals, it addresses very specifically the question of John Thompson. Very specifically.

Q. And would you agree with me that there's no sentence in there that says, and if you withhold *Brady* material, it will affect the constitutional rights of the defendant?

A. Would I agree that that language that you've just used is not in there?

Q. Yes.

A. I agree.

Q. And the final sentence in this paragraph says, "In all cases a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pretrial conference and each assistant must be familiar with the law regarding exculpatory information possessed by the State." Is that what it says?

[p.804] A. That's exactly what it says.

Q. And so the burden here is put on the individual assistant to make sure that he or she is familiar with the law, am I right?

A. It's -- yes. And I want to be answer this, please. In my opinion, that's the only sentence that needs to be in 5.25. In my opinion, in all cases, a review of *Brady* issues, even if the accused makes a statement that appears to be self-serving, has to be included in our pretrial conferences, and every assistant, not just because that assistant is a prosecutor, but because that assistant is a lawyer, must be familiar with the law regarding disclosure of exculpatory information.

Q. Would you agree with me that, aside from this reference to self-serving statements made by the defendant, this section doesn't give an assistant any guidance as to what is or is not *Brady* material?

A. I disagree.

Q. During your testimony yesterday, one of the things you were asked by Mr. Goins was whether prior to this written standard there was a standard that Mr. Connick had used throughout the office and what that was. And I believe you testified that the standard that Mr. Connick had articulated was evidence favorable to the accused must be produced. Is that what you said yesterday?

A. That's correct. Well, I frankly don't remember my quote, and I know better now, Mr. Cooney, than to trust you on my quote, [p.805] so I don't know what you're quoting or when.

Q. What was Mr. Connick's standard, sir, in -- prior to the production of this written document?

A. Pretry your cases, know what the cases say from the Supreme Court, get consultation, and there are a myriad of things involved in *Brady* issues, a myriad of things. And we've only touched on a couple.

Q. If other witnesses have testified in this case that the policy was simply, quote, follow the law, is that a more accurate recitation of Mr. Connick's pre-1987 policy?

A. I would say that if those attorneys believed that was the policy, they were in trouble.

Q. Okay.

A. It starts with following the law.

Q. Now, let's talk about the pretrial conferences that you mentioned yesterday and some other issues. Am I correct that with regard to *Brady*, Mr. Connick had a lot of activities that he was responsible for as the District Attorney's Office besides sitting down and reading opinions that were coming down from courts?

A. Sure. Sure.

Q. And would you agree with me that he was really dependent upon others in the office to make sure that somebody was familiar with the *Brady* standard?

A. Sure. Primarily the first assistant and the chiefs of the [p.806] various divisions for instruction.

Q. And you talked about the process by which the junior assistant and the senior assistant would pretry a case?

A. That's correct.

Q. Would you agree with me that special prosecutors were not required to pretry cases?

A. Generally speaking, special prosecutors, and you had to have permission to be one, were more experienced and likely not going to pretry cases.

Q. And Mr. Dubelier was a special prosecutor in the murder case of John Thompson?

A. I have come to learn that he was while he was chief of screening.

Q. And Mr. Williams was a special prosecutor in the armed robbery case, am I right about that?

A. Yes.

Q. Would you agree with me that a system of *Brady* compliance in an office that's based on supervision by other attorneys in a pretrial setting is dependent upon whether the supervisors are adequately trained?

A. Yes.

Q. Would you agree with me that it's often a difficult decision for a prosecutor to determine whether or not a particular piece of evidence is exculpatory?

A. Not often. It is sometimes. It is sometimes very apparent. [p.807] It is sometimes not.

Q. Now, you are currently the chief of screening in Jefferson Parish?

A. No, I'm not. I'm currently the chief of trials.

Q. Chief of trials. But at one point you were chief of screening; is that right?

A. That's correct.

Q. Would you agree with me that a chief of screening has to try to develop a good relationship with the police?

A. I believe a relationship with the police is one of the most important aspects of a chief of screening. Communication, that is communication.

Q. Would you agree that in a complex case, the chief of screening usually would have regular contact with the detectives?

A. Yes.

Q. Maybe daily contact?

A. Let me say, we had this discussion in my deposition when you were asking questions. It isn't necessary -- there may be many conferences by a police officer working a case with the chief of screening. I don't know that those conference -- in my experience, and I can speak from mine only, I would not know the whole case. Perhaps an officer came to me and said, I'm having a problem. I might need an immunized witness. I can only do that through Grand Jury. It doesn't mean I would know the whole case. They would bring to me what roadblock they have in a case, and as

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[p.813] transcript.

Q. The seventh item was an affidavit from --

A. May I stop you for a moment. I do recall having heard Ms. LaGarde's testimony several times from others, but I don't remember getting the transcript from you or Mr. Banks.

Q. The seventh item was an affidavit from Mr. Riehlmann?

A. Yes, I remember that well.

Q. And the eighth item was an affidavit from Mr. Bertel?

A. And I remember that, but I couldn't tell you what it says. I remember there was one, but I don't remember what it says.

Q. Would you agree with me that the evidence that Mr. Banks and I had brought to you at that point tended to show that John Thompson was not the perpetrator of the armed robbery and raised some pretty serious questions about the integrity of the prosecution against John Thompson for armed robbery?

A. Yes.

Q. And would you agree with me that the District Attorney essentially had had no choice but to agree to our request for a stay of execution under those circumstances?

A. You remember it as your request. I remember us taking the lead.

Q. So you don't believe that when we came to you with all of this information, we didn't say, "Mr. McElroy, we have all this information, Mr. Thompson is supposed to be executed in two weeks"?

[p.814] A. Yeah.

Q. "We're going to file a motion tomorrow, but we would much rather do it with you because there is no reason for us to have a fight over this"?

A. That could be it. That's right.

Q. That's what happened; right?

A. Well, that sounds right. That sounds right. I know you're saying that. I remember Harry Connick saying, I'm doing it, whether they do it or not.

Q. I would like for you to look at Page EX00588, which is a couple of pages earlier.

A. In the same exhibit?

Q. Yes, sir.

A. And what again is the page number?

Q. 588 in the lower right-hand corner.

A. Yes, sir.

Q. Okay. And am I correct, if you could just take a moment and familiarize yourself with that page.

A. (Witness reviews the document.)

Q. Just let me know when you have had an adequate period of time to read it.

A. (Witness reviews the document.) I have.

Q. Okay. Thank you, Mr. McElroy. Looking at the paragraph that starts "On the morning of April 29th," am I correct that what this paragraph is talking about is the meeting in your [p.815] office with Mr. Solino and Mr. Whittaker?

A. That's correct.

Q. About the discovery of this blood evidence?

A. That's correct.

Q. And I would like to direct your attention to the bottom third of the page, and there's a sentence that says, that starts with "Whittaker also stated," and let me read this to you and make sure I read it correctly, and then I want to ask you some questions about it.

"Whittaker also stated that Riehlmann had had a lengthy conversation with Stewart J. LaGarde, one of the victims in the robbery case on April 28, 1999. According to Whittaker, Riehlmann informed him that Jay LaGarde stated that during the trial, he had asked Jim Williams, a former Assistant District Attorney who prosecuted the Thompson robbery with Deegan, if anything had developed from the blood evidence. According to Whittaker, Riehlmann stated that LaGarde told him that Williams told LaGarde that, quote, 'the blood evidence was inconclusive.'" Is that what that says?

A. That's what it says.

Q. Now, do you recall ever having a conversation with Jay LaGarde?

A. Yes.

Q. And am I correct that Jay LaGarde told you that he wasn't sure it was Williams, but it was either Whittaker or Williams [p.816] that said that to him?

A. As I recall it was either Whittaker -- no, it was either Williams or Deegan, but I don't recall that Mr.

LaGarde said he -- what I do recall is Mr. LaGarde could not specifically identify who of the two of them did.

Q. Let's go to Page 143, Line 9 of the deposition, if we can. Rather than putting it up, Mr. McElroy, let me read, refer you to 143, Line 9, of your deposition and we'll read it. Starting at Line 9 on Page 143:

"QUESTION: According to Whittaker, Riehlmann stated that LaGarde told him that Williams told LaGarde that the blood evidence was inconclusive.

"ANSWER: I see that statement.

"QUESTION: Okay. Do you remember hearing from any source that Mr. LaGarde had said he was told by Williams that the blood evidence was inconclusive?

"ANSWER: I don't recall ever hearing that. I recall, if my memory serves me correctly that during the course of our investigation of trying to piece this particular case together, I don't know from where I learned it, but I do remember reading and it might have been the hearing I referred to earlier, the transcript of the hearing, that Mr. LaGarde, in conversations with someone he could not recall, he knew it was an Assistant District Attorney, but he did not know whether or not it was Mr. Whittaker or Mr. Williams that he had a discussion about [p.817] blood evidence. That's what I recall.

"Your recollection is that this came from Mr. LaGarde?

"ANSWER: Yes.

"Did you ever talk directly with Mr. LaGarde?

"ANSWER: I did."

Was that your testimony?

A. That's right.

MR. COONEY: I have no further questions, Mr. McElroy. Thank you.

THE COURT: Redirect.

MR. GOINS: No redirect.

THE COURT: Okay. You can step down, Mr. McElroy.

THE WITNESS: Thank you, Your Honor.

THE COURT: Who is your next witness?

MR. AARON: Mr. Connick. Could we take a break, Your Honor?

THE COURT: Yes. Let's take our morning recess right now for about 15 minutes before we start with the next witness. All right. Please leave your notebooks in your chairs or under your chairs.

THE DEPUTY CLERK: All rise.

(WHEREUPON, the jury panel leaves the courtroom.)

THE COURT: Clay should have the latest revised version of the jury instructions for you-all in a minute or two. It's not necessarily a final version. It's the latest version. And [p.818] we're still thinking and looking at a few things.

MR. AARON: Do I have time to run to the men's room?

THE COURT: Yes. We're taking 15 minutes.

(WHEREUPON, at this point in the proceedings there was a brief recess.)

THE DEPUTY CLERK: All rise.

(WHEREUPON, the jury panel enters the courtroom.)

THE COURT: All right. Please be seated.

MR. AARON: At this point, Your Honor, the defense calls Harry Connick.

THE DEPUTY CLERK: Please raise your right hand.

HARRY CONNICK

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. AARON:

Q. How are you doing, Mr. Connick?

A. Fine, thank you, Mr. Aaron.

Q. I notice you have two hearing aids. Can you hear me?

A. Yes, I hear you fine.

Before you start, may I apologize to the Court for my outburst the other day and to the Members of the Jury and also to the officers of the Court. I think I forgot my own rule in the case.

THE COURT: That's fine. Would you please start by

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[p.823] A. Well, I left the job to run against Mr. Garrison in 1969. I was unsuccessful. So I went into practice with my wife. And then in 1973, I sought election again against Mr. Garrison again, and I was elected, and I was sworn in on April 1st of 1974 to the job.

Q. Let's talk a little bit about that period when you were in practice with your wife. What was the nature of your practice?

A. It was criminal law again. That's what I loved and that's what I practiced mostly. I did some civil work,

and, you know, had to, I was introduced to a lot of civil practice, but my main interest has always been criminal justice system.

Q. When you became District Attorney for the Parish of Orleans, was there anything that you did with respect to organization or reorganization of the office?

A. I completely restructured the office. One of the first things I did, we kept most of the assistants who Mr. Garrison had on his staff, but I imposed some dramatically different changes in the office. And I wasn't familiar with the people that Mr. Garrison had in his office, but I structured the office to provide greater efficiency in the office, and better -- better access to more information about the criminal justice system, and installed a number of checks and balances.

I began by creating a different standard in the Screening Division. Normally, prosecutors accept a great percentage of the cases that the police bring to them. As a [p.824] legal aid attorney and as a criminal defense attorney, I learned early on that a lot of people get arrested and spend time in jail and they really shouldn't even be there. And so I designed a program that made a different screening setup that don't take a case unless a crime has, in fact, been committed. And if the person that's arrested, in fact, committed that crime. And if you have enough evidence, legal evidence to go forward and get a prosecution. And the consequence of that, the acceptance rate in the office went from, I guess, between 80 and 90 percent to down to 50 percent, which the police didn't like very much, but playing a political issue in campaigns, they wanted me to charge more people, but I wasn't going to run

that kind of office with a lot of plea bargaining. I brought over, I requested eight former Assistant United States Attorneys, who I had worked with. One of them was Bob Livingston, Mike Ellis, Dan Markey, Pat Hand, a bunch of them that I knew from over here, if they would come work for me. They were in private practice at the time. So these were all people I knew and I knew that they would buy into what I was teaching and what my philosophy was and so they agreed to leave their practices and come work for me. And their job specifically was to help me set this office up to train these people.

Also, they had maybe a handful of investigators in Mr. Garrison's office. To me, one of the essential ingredients of an effective prosecution is to have a police officer as the [p.825] investigator in each section of court. And Superintendent Clarence Giarrusso was very cooperative in letting me have, we went up, I think, to 23, 24, 25 investigators. One investigator was assigned to each section of court. And I would tell my assistants that this is the keel of our ship. This is the person who you go to if you need some advice about a rap sheet or about motions, and they were experienced guys, had been on the force for 20, 25 years, some of them. And they helped, the junior assistant was under the supervision of a senior assistant. And so with that structure in place, we proceeded to try a lot of cases. My policies stimulated a lot of cases. We didn't support a lot of plea bargaining unless we had to do it. And consequently the number of trials accelerated substantially in the office, way over anybody else in the State of Louisiana. And some of my lawyers tried 40, 50, 60 cases a year.

Q. Let me cut you off just a little bit.

A. Okay.

Q. Can we focus in on what, if anything, you did with respect to the assignment of attorneys to sections of court that was not done by your predecessor, Mr. Garrison?

A. Well, a lot of the people in Mr. Garrison's office were assigned to special units, to armed robbery, and they were good, armed robbery unit. In fact, one became one of my first assistants. And homicides, and one of those fellows became the head of my criminal bureau when I started. And so they had those [p.826] units and they had one lawyer in each section of court. And I really wanted two lawyers, and so that's what we did, two. I broke up those units and redeployed those individuals.

Q. Why did you think there should be two lawyers in each section?

A. I wanted to get -- one of the assistants, the young assistants that I met when I went out there, I was talking to him one day about the cases that he tried, and I said, I said, "Did you ever try a murder case?" "No." "Did you ever try an armed robbery case?" "No." "Did you ever try a rape case?" "No." But he said all of those guys in those different units, the rape, homicide, et cetera, they tried those cases. I said, well, I want my young people to be exposed as much as possible. And so one of the things we did to expose them, to teach them to this was to break up those units and send those more experienced lawyers down to the sections of court, and they with the former Assistant U.S. Attorneys formed an excellent teaching tool.

In fact, one of my former lawyers is in the back and told me that he was one of the teaching officers and I didn't remember him as doing that. He said, yeah, every Saturday morning we were down there teaching and they were. But I had forgotten about that.

Q. On the subject of training and teaching, beyond assigning a junior and a senior assistant to each section, is there anything else that you did? Could you tell the jury about it?

[p.827] A. My memory is -- you would have to refresh it in some way for me.

MR. AARON: Your Honor, because of his age, could I lead a little bit?

THE COURT: Go ahead.

EXAMINATION

BY MR. AARON:

Q. Specifically, let's talk about pretrying cases. Did you do anything in terms of pretrying cases?

A. Absolutely. That was essential. You couldn't go to trial without having spoken to a senior assistant about the case, and it was the senior assistant's responsibility, which imposed a big burden on them, and they had a broader shoulder of knowledge than the other young people did. And they were subjected to that on a regular ongoing basis, in addition to these trial meetings.

The seniors, if they wanted to go to trial, they were supposed to go to the head of the Trial Division and do the same thing. The Trial Division had weekly regular meetings with those assistants about what happened this week, what's going to happen next week and would bring out new decisions to them.

We would get the new decisions on a regular basis. Whenever I would see a young lawyer, I would say -- we had what they called advance sheets from the Louisiana Supreme Court. These were little books that gave only a small section of decisions that the Supreme Court or the appellate court would [p.828] write. And I would always remind them and I would tell them, remember in my days, the only time I had to read those things is when I went to the bathroom. I said take your advance sheet with you to the bathroom. And constantly getting them to read and to understand what was new in the law.

Q. Now, whose responsibility was it to disseminate these new decisions of cases, do you recall?

A. Bill Russell was my first assistant and we would sit down. We had a lot of -- every time we had a thought, we would put it into a written form. I was insisting on having a policy manual in the office.

In those days, most offices didn't have a policy manual. Running a -- compiling a policy manual was a full-time job. I mean, you had to put a lot of different data together, about anywhere from seven or eight to nine, ten or eleven divisions. And it was a lot of work. But we didn't have the time to devote to putting one together, but our policy manual was in existence, in essence, in one form or the other, from the first day we

went into office. And Mr. Wessell and I would dictate -- something would come up that needed to put in the manual, we'd write a policy manual, write a policy decision on it by memorandum and circulated it widely throughout the office.

When new decisions came down, the appellate, chief of the Appellate Division would digest that opinion and would send that around. And so there was a lot of circulation of new [p.829] decisions from Louisiana Supreme Court, the Fifth Circuit over here, and the Supreme Court of the United States.

Q. Early on in the plaintiff's case, they showed a little video of your deposition, and in there you said you stopped practicing law. Could you explain what you meant by that to the jury?

A. I think they wanted to find out if I was up on the law. And I'll readily tell anybody that I'm not a legal scholar. I mean, I love to go to the library and I love to do research. And I did it one time, claim a knowledge about searches and seizure, I wrote papers on it and gave lectures on it. But when I became a full-time DA, gave up my practice and if you wanted to work for me, you had to give up your practice. We wanted your attention, your professional attention exclusively on your responsibilities of the office. And so we -- so I stopped.

I recall, I looked at my deposition again, and they had said something about I gave up reading decisions, and I did give up going to the library, but I had -- I tried a number of cases. I tried a bunch of cases over the years, and that necessitated going to the library, but as a routine, we had an appellate chief, I had a

first assistant, and if I wanted to find out what the law was, I would call Val or somebody or Louise Korns who was there at that time, I said would you give me a reading on this *Brady* case or whatever it may be. And I would get a memorandum in a very succinct form, but I didn't study the case like I had to if I were going to use it in court. But they were correct, I [p.830] guess, in assuming that I didn't study the law like I did, I had to when I was a private practitioner.

Q. It's my understanding during the 29 years that you were District Attorney for the Parish of Orleans, the Louisiana Legislature enacted a number of laws on the subject of criminal law and criminal procedure. Could you tell the jury to what extent, if any, you may have participated in the development of those laws?

A. Yes. New Orleans, because of its unique position in the city -- in the State, had a substantial number of cases, more than other jurisdictions. Consequently, we would get a lot of fact situations in our court that were received before other jurisdictions because they didn't have a lot of cases like we did. And from that would oftentimes come suggestions for new, enacting new laws. And we did that.

For instance, the fellow with the firearm statute, that increased significantly the penalty of someone who had been convicted of a crime, a felony to possess a firearm. We originated that. We went to Baton Rouge, and all of -- in 28 of my 29 years I would go to Baton Rouge every legislative session. I was a member of the Louisiana District Attorneys Association. I was a member of the National District Attorneys Association. I was a member of the Board of the Louisiana DA's Association, and I was a lecturer for

them, but we would go to each session, and as a member of the Board, we would introduce our legislation to

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[p.834] one of their experts, about open file versus closed file. Could you, what was your policy? And why?

A. We had a policy of, first of all, teaching the law to the -- to the lawyers. And our policy primarily came from the law of the State of Louisiana, particularly the discovery law. The cases that was decided in Louisiana on criminal law and procedure, the United States Supreme Court cases, and then the Canon of Professional Responsibility. That was the framework of the policy of my office.

Some of the decisions said that we were obligated, which were very clear, we were obligated to turn over to the defendant certain items. Under the State statutes and under the, the laws of discovery particularly, they sort of reiterated a lot of that, both the State law -- the State law in many instances echoed the federal law, because if we would get a decision from the federal court, the legislators would incorporate that in the State law and then, of course, the canon of ethics. And those were -- that was the framework of what my policy was.

One of the Supreme Court decisions said, you know, you don't have -- the prosecutor doesn't have to turn over his whole file. And I had experience with open-file discovery, and you can use it with some people and not with others. So Jim Letten told me, well, I used, I was very liberal in giving it out. Other

attorneys, young attorneys particularly, you had to make it very clear to them what their responsibility was. And not give, they [p.835] had enough decisions to make without giving them a lot of leeway. But they knew that whatever that law was, they were responsible. They had learned it as a matter of fact. To take a bar examination, they had to understand all of what I'm telling you because they were quizzed on it. And so they knew what their responsibilities were. My policy was, as was stated in the article that Mr. Cooney, I think, referred to with Mr. McElroy, that they were obliged to turn over that information.

Q. But your policy was not open file?

A. No. And every -- some DAs have open file. It may be fine for them. But as a lawyer who grew up in the Criminal District Court watching defense lawyers operate and watching prosecutors operate, I thought it better not to have an open-file discovery.

Q. Did you ever --

A. And there's a lot of reasons for that, incidentally. It wasn't just a kwim, a whim, rather.

Q. You wanted to state some reasons?

A. Well, we were concerned about safety of witnesses and victims and such as that. And we felt that it was our responsibility to protect those people.

Q. With respect to your policies, did you ever instruct any Assistant District Attorney, any of the over 700 that worked for you, to violate *Brady* and not turn over

-- let me finish -- not turn over evidence that the defense was entitled to receive?

A. Absolutely not.

[p.836] Q. Now, over the course of the years, obviously, a few things slipped through the cracks, and on occasion, someone might have been found not to have turned over exculpatory evidence. What would you do if you found out and if the person was still working for you?

A. Well, I would talk to the person and find out what happened. If they were still in my employ, I had control over that situation.

I know that Mr. Cooney, I think, during my deposition asked me if I ever reprimanded anyone. I reprimanded lawyers a lot of times, but I had to have some reason to. To me a reprimand is a, is a serious matter. I mean, you're accusing someone of not doing what they were supposed to do. And before I reprimand anyone, I would like to get my facts. And I would find out if these people, if they were still in my employ, what happened in the case and they would explain it to me. And I may not have made the same decision that they would have made or that they actually made, but it was, it was one that was, it wasn't perhaps, it was a neglect to do something they should have done sometime, but you have a young lawyer and he goes into a section of court, they mentioned Judge Calvin Johnson wrote a letter.

Q. I was going to get to that.

A. Well, the letter was very vague as to what specifically he had in mind. He didn't name anyone. He didn't name any specific transgression, but I took it upon myself to find out, well, who [p.837] was in that section of court? What would prompt Judge Calvin Johnson to write this letter. Well, this young man named Jim Dugan and he hadn't been with me very long, and he was very conscientious and he was transferred to Judge Johnson's court and after being there only a short time, and Judge Calvin Johnson incidentally had one of the biggest backlogs, that was his way of handling his business, one of the biggest backlogs in criminal court. At that time I think he had 300 plus cases on his docket that were backlogged as compared to some other lawyers that may have had 40 or 50. Well, it's a lot more difficult to go into a section when you're young and you're new at it and review 300 cases as it is opposed to go into a section that has maybe 40 or 50. And he was faced with a situation of turning something over. He said, Mr. Connick, to be honest with you, I haven't had a chance to look at all of those files. I said, okay. I said, try to look at your, try to, I did teach him, tell him, look at your docket for that week, for the next day and the day after that, and pull those cases and find out what you have to do in those. Because managing a docket was new to them. And, you know, they just -- you had to give them some understanding.

Q. Now, the letter that you're talking about, and I'm sure they'll correct me if I get the date wrong was in 1998, wasn't it?

A. Yes.

Q. Prior to 1998 -- well, no, let's say prior to 1985, let's [p.838] focus in on the Thompson case, did you ever receive a letter from a judge complaining about not turning over exculpatory evidence?

A. No. No. At the time something else I was shown on my deposition was a list of cases, there were about 15 of them, and I was asked if I knew about them. And some of them I had no idea what they were about. But subsequent to that, I've looked at those cases. Only four of those cases were cases that came out of my office from 1974 until 1984. Four of them had to do with written decisions regarding failure on the part of people in my office to turn those, to turn over favorable information.

And I looked at the decisions and I think in virtually every one of -- literally every one of those decisions, the lawyer in those, in those four cases were employed by me at the time, by me, they had made a decision not to turn something over, the judge had ruled it that they were correct, he looked -- they had motions to suppress, motions to discover. The judge had looked at those, heard the arguments on it and agreed with us. But anyway, the court of -- our appeals at that time went directly from the criminal court to the Supreme Court. No cases before the Court of Appeals in Louisiana at that time.

Q. You mean criminal cases?

A. Criminal cases, that is. And so the Supreme Court of Louisiana sent over in '74, '76, '80 and '82 or something like that, those four cases and at that time frame we had thousands of decisions that were appealed to the Louisiana Supreme Court, [p.839]

thousands. And so four decisions out of those and Mr. Williams wasn't involved in any of them and neither was anybody else we're talking about in this case. And it was an unusual thing for my office to receive a reversal at that time. And everybody reacted to it and they were, what are you talking about? Who was reversed? Why? And that was immediately disseminated through the office and everybody was aware of it and this is what you avoid. This is what you avoid.

Q. Did you attend the meetings where these decisions were disseminated?

A. Absolutely. In fact, Mr. Whalen this morning was telling me we had Saturday meetings on these subjects, you know. Frankly, I had forgotten about that. But, yeah, they were discussed.

Q. And if there was a problem, did you personally tell your assistants don't do this again?

A. Absolutely. I used to visit, I was accused of micromanagement. I used to visit those divisions. I'd go walk in and not talk to the chief, but I would talk to the young lawyers and find out what they were doing and how they were doing.

Q. During the course of your tenure as District Attorney, did you personally handle any cases?

A. Oh, yes, a number of them. One of the earliest cases I tried was a case against one of the real kingpins of dope pushers in the city, Joseph Sylvester in a murder-for-hire case. I

* * *

[p.850] A. Absolutely.

Q. As well as the constitutional laws of the State of Louisiana?

A. Absolutely.

Q. Now, if someone in your office were to fail to turn over *Brady* evidence, evidence that under the Constitution a defendant was entitled to receive, would that person be following your policy or breaking your policy?

A. He would be breaking my policy, not violating the policy. Not following the law.

MR. AARON: Excuse me one second.

Mr. Connick, I have no further questions. I tender you to plaintiff's counsel.

THE WITNESS: Before we do that, can I ask for a break, Your Honor?

THE COURT: All right. Let's take about a five-minute recess.

THE DEPUTY CLERK: All rise.

(WHEREUPON, the jury panel leaves the courtroom and at this point in the proceedings there was a brief recess.)

THE DEPUTY CLERK: All rise.

(WHEREUPON, the jury panel enters the courtroom.)

THE COURT: Please be seated, everyone.

MR. COONEY: Your Honor, may I approach?

THE COURT: Mr. Cooney. Yes.

[p.851] CROSS-EXAMINATION

BY MR. COONEY:

Q. Mr. Connick, I'm just going to hand to you a binder of a few documents and the transcript of your deposition.

A. Yes, sir.

Q. I'm going to try to be relatively brief, Mr. Connick.

Would you agree, Mr. Connick, that as the District Attorney, you were aware that from time to time the State would come into possession of *Brady* evidence in criminal cases?

A. Of course.

Q. And would you also agree with me that you also knew that if the favorable evidence came into possession of the State and if it wasn't produced to the defense, the result of that would be a violation of the accused's constitutional rights?

A. Yes.

Q. Now, I think you testified during your direct examination by Mr. Aaron that you did not have an open-file discovery policy in 1985; is that right?

A. Not as a matter of policy. We just said the defense is entitled to what the law provides and what *Brady* provides, what the Louisiana discovery law provides and what the professional responsibility for prosecutors provides.

Q. But open-file discovery as you understand it is when the prosecutor basically literally opens his file and says to the defense lawyer, take a look, here it is.

[p.852] A. I've defended and prosecuted a lot of cases, Mr. Cooney, and I know exactly what that means, and some of my lawyers, Mr. Letten, for one, when I spoke to him, he said, you know, I had generally an open-file policy. Other former assistants have done that, but I did not have an open-file policy.

Q. For the office, you made the policy decision?

A. And the Supreme Court has ruled, I'm learning as I read some of these cases, that the prosecutor doesn't have to give over everything that's in his file.

Q. It's a policy decision on your part whether or not you're going to adopt open-file discovery; right?

A. Yes.

Q. And at least as far as the policy office is concerned, you decided you were not going to have open-file discovery as the policy of the office?

A. Yes.

Q. Would you agree with me, if you don't have open-file discovery, that means it's going to be up to the individual prosecutors handling particular cases to do a thorough review of the file and make sure they get things right under *Brady*?

A. The individual prosecutor, plus there is in my office is a senior assistant, or the trial chief, or someone above him, and if, if you look at the checks and balances in the system, the judge has to be involved in that, too, because it becomes an issue when an attorney for the defendant files a motion for [p.853] discovery.

Q. And the judge only gets involved if somehow it gets brought to the judge's attention; is that right?

A. Well, the defense lawyer usually brings it to the attention of the judge, and the judge will, the ones that I have been before, will, and this is what, again, the law says, will, it's a motion, and it's to be heard before a judge. The question, the request is made for information, and if it's denied, if there is a basis for it, then the judge will, and the prosecutor will decline to turn it over. The judge has to decide that. Even by in camera inspections, if necessary.

Q. But typically the judge is not going to take the prosecutor's entire file and look through it and decide what's *Brady* and what's not?

A. No. That's a decision that lawyers make. Do it every day.

Q. Would you also agree in order to be able to make the right decision under *Brady*, the lawyers that are working on a particular case, not only have to do a thorough review of the file, they also have to understand the law?

A. Yes.

Q. Would you agree with me that in 1985, many of the assistants, the Assistant District Attorneys in your office were coming fresh out of law school?

A. Yes.

Q. And in 1985, you had section chiefs that were less than four [p.854] years out of law school, like Mr. Dubelier, for example?

A. Yes.

Q. Are you familiar with the American Bar Association?

A. Of course.

Q. And could you just tell the jury what the ABA is, Mr. Connick?

A. The American Bar Association is a group of lawyers who, it's an organization of attorneys, and they specialize and train lawyers in different aspects of the law, in civil law and criminal law, constitutional law, commercial law, all kinds of things, and they have a publication on a regular basis, and they have a standard of conduct that it's not, it's just their opinion

of what it ought to be. It's not the law. You don't have to follow it if you don't want to.

Q. Would you agree with me that the American Bar Association or the ABA is the national organization of all lawyers in the U.S.?

A. It's a very liberal national organization when it comes to criminal justice.

Q. Were you aware that in the 1970s, the American Bar Association issued something called the American Bar Association standards for criminal justice?

A. Yes.

Q. And were you aware that it included specific standards for the prosecution function?

A. Yes.

[p.855] Q. Did you know that the then Chief Justice Warren Burger of the Supreme Court, called the standards, quote, the singlemost comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history?

A. No.

Q. Are you aware that a second edition of the ABA standard, first edition, '74, are you aware that the second edition was released in 1980?

A. I don't recall the dates on that.

Q. Generally, is that consistent with your recollection as to --

A. I would say so.

Q. And are you aware that the ABA standards included a provision called ABA Standard 11-2.1 which concerned the pretrial disclosure by the prosecutor?

A. I may have by number at that time, but by concept, I think I recall that.

Q. Mr. Lawless, were you here for Mr. Lawless' testimony the other day when he talked about that during the plaintiff's case?

A. No, I wasn't able to be here.

Q. If I could, Mr. Connick, would you take a look at Exhibit 78 which is in your binder and I'm going to ask Mr. Vincent if he would be kind enough to put that up on the screen. And I'm going to refer you to Page 27, first, if I can. And would you agree [p.856] with me that --

A. One moment, please.

Q. -- what appears on the beginning of 27 and carrying over to 28 would be a --

THE COURT: Which exhibit?

MR. COONEY: I'm sorry, Your Honor, it's Exhibit 178.

THE COURT: Why don't you see if you can assist Mr. Connick in finding the right exhibit.

THE WITNESS: I have 78. I thought you said 78.

MR. COONEY: 78, I think that may be right. That's it. Thank you, Mr. Connick.

EXAMINATION

BY MR. COONEY:

Q. And would you agree with me that what appears there is the ABA's Discovery Standard 11-2.1, Prosecutorial Disclosure?

A. I see it.

Q. And, Mr. Connick, the question is simply whether you recognize that as the ABA Discovery Standard 11-2.1, Prosecutorial Disclosure?

MR. AARON: I don't think he heard you.

THE WITNESS: I'm sorry. What was the question?

EXAMINATION

BY MR. COONEY:

Q. The question, Mr. Connick, is do you see that that is the ABA Discovery Standard 11-2.1?

* * *

[p.858] police and the police are working with the prosecutor on a particular matter, the obligation to disclose includes that as well?

A. This is what they say. But, may I address that?

Q. Well, I think, Mr. Connick, I think your counsel can ask the questions in redirect.

A. This is in response to what you have, but okay.

Q. Thank you. Are you aware just looking at this document as well, Mr. Connick, that Standard 3-2.5, it's a little bit further in that document, also --

A. What page is that on? What page is that on?

Q. It's on the next page, I think, Mr. Connick.

A. I see it. Office handbook?

Q. Yes, 3-2.5.

A. But before we, the jury has seen these things that you mentioned, but one of them is under Louisiana law, inadmissible.

THE COURT: Wait a minute, Mr. Connick, wait a minute. Let's try to just answer Mr. Cooney's questions, if you would.

THE WITNESS: Okay.

THE COURT: Answer his questions and then you can answer Mr. Aaron's questions again. Go ahead, Mr. Cooney.

EXAMINATION

BY MR. COONEY:

Q. Mr. Connick, I'm directing your attention to Standard 3-2.5 of the ABA standards. And in that, this deals with a [p.859] prosecutor's handbook policy guidelines and procedures, is that what that section deals with?

A. On Page 29 at the bottom, you have office handbook. Is that what it is?

Q. Just above that, Mr. Connick. Standard 3-2.5, prosecutor's handbook?

A. Right. I see it.

Q. And what it says in Section A is that it says, each prosecutor's office should develop a statement of, 1, general policies to guide the exercise of prosecutorial discretion, and, 2, procedures of the office. The objectives of these policies are as to discretion and procedures should be to achieve a fair, efficient and effective enforcement of the criminal law. Is that what that says?

A. Yes.

Q. And in the part down below that says office handbook, am I correct that the ABA standard also suggests that the articulation of policies and procedures should be preserved and a handbook or manual that reflects current rules, statutes and judicial decisions. It should also contain detailed descriptions of the criteria governing the principal

duties of the office. Highly useful manuals have been established in many prosecutor's offices. They serve to maintain consistent practices and continuity despite changing personnel, and tend to assure that the policies adopted at the highest levels of the office are [p.860] observed by the staff. Is that what that says, Mr. Connick?

A. And that's what we had.

Q. Now, the ABA standards are not mandatory. They are not the force of law; correct?

A. That's correct. And some of them are suggesting illegal activity in Louisiana, particularly about the Grand Jury. They suggest that, and I read this, you read it, that the -- those portions, and in small (iii), those portions of Grand Jury minutes concerning testimony of the accused and relevant testimony of witnesses, Louisiana law doesn't prohibit making public the activity before a Grand Jury. And then the second one, they say, (i), the letter (i), one (i), names and addresses of witnesses together with their relevant written or recorded testimony, the names and addresses of witnesses have led, in my city, to the death of witnesses, and to the intimidation of witnesses. And I'm not about to expose somebody who comes forward in a criminal case with possible death. That's why we have a great deal of difficulty in having witnesses come forward today who are being killed. I wouldn't make that available to defense lawyers. I prosecuted a person for killing witnesses.

Q. Mr. Connick, with respect to the provision with respect to a handbook, am I correct that the first handbook in the office was 1987?

A. No, not -- technically, you may be correct, but we started to gather information from day one, before I took office, I [p.861] wanted a policy manual. I'm a manager, I had a business when I was in law school, I ran it with my now deceased wife. And I think I know something about management. And I think policies have to be in writing. We did that from day one. We didn't have the time or the money to dedicate to this work like this. What they are suggesting to is extremely difficult for lawyers, prosecutors to do. Try going to the council and tell them you want a manual and you want a certain amount of money, 25 or 35 or $50,000 to print up a hundred and something manuals and to do the research on it. You have to consider what we did under realistic circumstances. This is -- ABA is a -- this is talking about what would be nice to have. And I agree, what can be implemented should be implemented, but some of them are impossible to implement.

Q. And are you aware, Mr. Connick, that there's a stipulation in this case that defendants have not provided or identify any written policy promulgated by the District Attorney's Office concerning *Brady* that predates a February 1987 policy manual other than the Code of Professional Responsibility which concerned *Brady* and which had been in existence since 1970?

A. I'm well aware of that, Mr. Cooney. They didn't run the office, I did, and while we were waiting for that policy manual to be put into a three-ring binder like this, we -- we did promulgate, we did prepare and promulgate, send among our assistants policy changes as they happened. And they were, they [p.862] were what became the contents of the policy manual. So

they existed. We didn't just divine a policy manual overnight on February the 1st of 1987. Something had to take place before that. And that was a lot of work.

Q. And Mr. McElroy described the fact that the policy manual was a compilation of the prior memoranda; is that right?

A. Among other things, yes.

Q. Let's take a look at that manual, if we can, Mr. Connick. I believe it's Exhibit 51 and if I could, once you find it, Mr. Connick, can we just go to Section 5.25, please.

A. Is this the manual?

Q. It is. It's Exhibit 51 in this thick binder, Mr. Connick.

A. What page is it on?

Q. It's behind the tab marked 51, sir.

A. 51.

Q. Thank you. Thanks for bearing with me on this.

A. All right, I have it.

Q. And I think if you go to Section 5.25, which is on Page -- it's marked down on the bottom, Mr. Connick, EX000427, Section 5.25.

A. I have it.

Q. In looking at that section, is that the section from the policy manual that dealt with *Brady*?

A. Yes, sir.

Q. And in looking at that section, one of the things that [p.863] struck me is there is a sentence in here that says, failure to produce *Brady* material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. Do you see that?

A. Yes. I've read it before.

Q. Do you see any sentence in there, Mr. Connick, that talks about how failure to produce *Brady* material has a significant impact on the rights of the criminal defendant?

A. If a lawyer, either a prosecutor or a defense lawyer doesn't know that from the first day he studies law, then something is wrong with him. Everybody knows that. It's an extremely serious violation to deny anyone of any constitutional right and I don't think I have to put it in writing that it's against the law to do that.

Q. But, sir, what it focuses on is not the rights of the accused. It focuses on the impact from mistrials, reversals and extended court battles, that's what it focuses on; right?

A. If that's your opinion of it, you can certainly have that opinion, but I don't agree with you at all on that.

Q. Now, prior to 1985, I think Mr. Aaron asked you some questions about some prior *Brady* violations that occurred in your office?

A. Yes.

Q. And am I correct that one of those cases was *State v. James Carney*? Do you remember that case?

[p.864] A. Do you have that list of cases in front of you?

Q. I actually have some cases in that binder there, Mr. Connick. If you don't mind, if you look at behind tab, the first tab in the – behind Tab A in that binder, there are some cases.

A. I know *Carney* is one of them.

Q. And am I correct that *Carney* was a murder case?

A. Yes, I think it was. Yes.

Q. And it involved your office; am I right?

A. Yes. There were four cases before 1985, all cases were decided by the Louisiana Supreme Court. All had to do with the suppression of *Brady* evidence. All of them were the defendant had filed a motion requesting the State turn over exculpatory evidence. It was heard before a judge. The judge ruled in our favor on it. It went to the Supreme Court, and the Supreme Court reversed it. It was a 4/3 decision and the dissent said that we were as right as the other four said we were wrong, but I recall those four cases.

Q. Do you recall there were at least four cases from the Louisiana Supreme Court before Mr. Thompson's case where there were *Brady* violations found by the Louisiana Supreme Court?

A. Yes, four cases out of 10 years of cases which would be thousands of decisions.

Q. And, Mr. Connick, am I also correct that there will be individual cases decided at the trial court level where the trial [p.865] court would say, I disagreed with the view of the prosecutor, turn over the material?

A. Right.

Q. And those wouldn't be caught in any published opinion. That wouldn't be something that we could go back to now and say, well, in this case, in this case, in this case --

A. No.

Q. -- that the trial judge disagreed with the decisions by your prosecutors?

A. I think there were four cases, and those cases, that information was volunteered by my office to someone along the road, which was also given over to you or you got from something. That was something we had calculated voluntarily, and shared with anybody who wanted it. We felt it was a public record, but there were four cases that were decided at the district court level that we were, we had failed to turn over evidence. There was no written opinion on it, though, so I can't tell you.

Q. Four cases at the Supreme Court level?

A. No.

Q. Right. We were talking about four cases at the Supreme Court level?

A. There were four cases before 19 -- four cases before Mr. Thompson's case that were decided by the Louisiana Supreme Court.

Q. Correct.

[p.866] A. You're talking about cases where there were no decisions, and there were, I think, four of those decided by the district court, and there are no opinions at all on that.

Q. And, Mr. Connick, there are often cases where a defense lawyer and a prosecutor would go before a judge and have an argument about whether something should be produced or not. There's no decision. Those cases aren't captured in that list, are they?

A. Say it again, Mr. Cooney.

Q. Every day lawyers are going in front of judges and arguing over motions on a variety of issues, would you agree with me about that?

A. Yes, sir.

Q. And a lot of those decisions, the decisions by judges, in those kinds of situations, are not reduced to writing in a formal opinion, am I correct about that?

A. Yes, sir.

Q. And that would also be the case with regard to decisions regarding *Brady* questions, am I right about that?

A. I would presume so.

Q. Now, with regard to the blood evidence in this case, please, Mr. Connick, I think you testified that in 1999, you did learn about the crime laboratory report and the other documents that were brought to Mr. McElroy's attention?

A. No, I didn't know about anything but the report from the [p.867] crime lab on the blood evidence from you and Michael Banks.

Q. So you didn't know about the other documents that we gave to Mr. McElroy?

A. Not at that point.

Q. At some point did you become aware of those things?

A. I really became aware of them when you took my deposition. At that time.

Q. Okay. Now, there was some testimony this morning about the Grand Jury --

A. Yes, sir.

Q. -- in the case. And am I correct that just so we're clear about this, this was a Grand Jury investigation that you had initiated into the conduct of lawyers that

formerly were in your office concerning the handling of the John Thompson armed robbery case?

A. Yes.

Q. Had you ever heard of a District Attorney using a Grand Jury to investigate his own office's conduct before that?

A. No -- yeah, I did it. I did it a number of times, not only with my assistants, but we got complaints about people who came to the office and they claimed all sorts of things. Now, we could have, we could have turned it over to someone else and made it public, or we could have done a preliminary investigation ourselves to find out whether what we were told had any substance to it or not. If it had any substance, and we were involved in [p.868] it, we would recuse ourselves. And this was the same situation here. We -- I did not know what was told to me and you didn't tell me and neither did Michael, your associate tell me, Mr. Banks, about -- I knew nothing except the blood evidence information. But who else was involved in it, I had to find out who was involved, and I determined that we should take a preliminary look. I asked Mr. McElroy to investigate. He said, I can't find out anything. Only except against Mr. Deegan. So I said, well, let's try the Grand Jury and just probe a little bit and try to find out and may evidently change the situation and it didn't. And I didn't continue that. It was fruitless. It would be unfair, in my opinion, when I found out, one, we had nothing to go on, and two, it had prescribed. And so I decided to abandon the Grand Jury.

Q. My question was, had you ever heard of another District Attorney using a Grand Jury to investigate his or her own office?

A. I don't know. I've never heard of it, but I've done it.

Q. Did you think that using a Grand Jury to investigate your own office raised any potential conflict of interest issues?

A. That's why I qualified my answer to you, that we would probe and if we determined that there was some substance to it, we would immediately withdraw and turn over whatever information we had to the Attorney General of the State of Louisiana, which is what Louisiana law prescribed.

Q. Now, the actual proceedings before a Grand Jury, the [p.869] testimony before the Grand Jury itself, that's confidential by statute, am I right?

A. Yes, it is.

Q. So with regard to a Grand Jury investigation, you as the District Attorney could know what the witnesses would say before the Grand Jury, but persons outside the District Attorney's Office couldn't know what was said; is that right?

A. Well, you had to keep in mind, I don't know whether you've ever conducted a Grand Jury investigation, but we have many, and oftentimes you will find out before you go in to the Grand Jury what it is that you're looking for. And if -- if -- you go in, it's the same thing, well, you know that you don't have anything. In other words, you wouldn't have to disclose anything from the

Grand Jury to turn the case over to someone else to investigate. All you would have to do would be to take preliminary what you had -- preliminarily what you had and do it. If you give it, you know, give it to someone else to investigate. The Attorney General.

Q. I'm sorry, I didn't mean to interrupt.

A. That's all right. That's all right.

Q. In terms of what's said to the Grand Jury by the witnesses, that's not something that somebody outside law enforcement, the DA's office or on the Attorney General's Office can know about; correct?

A. That's correct. Regardless what have the ABA says.

* * *

[p.885] and I don't want to be sending you out at 6:00, 6:30 in the evening.

So what the plan would be is that after all of the evidence is completed this evening, we're going to recess. I'll send you home to come back at 8:30 tomorrow morning. When you come back in the morning, we'll be ready to do the closing arguments and legal instructions and then you can begin your deliberations, okay?

All right. Mr. Aaron.

MR. AARON: Bridget Bane.

THE DEPUTY CLERK: Please raise your right hand.

BRIDGET BANE

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on her oath as follows:

THE WITNESS: Bridget Bane, Bridget Bane, B-R-I-D-G-E-T, Bane, B-A-N-E.

DIRECT EXAMINATION

BY MR. AARON:

Q. Mrs. Bane, where do you currently reside?

A. I currently reside in Pacifica, California. It's close to San Francisco, a little to the south.

Q. You flew in just for this trial?

A. I flew in all night, as a matter of fact, just for this, yes.

Q. Were you ever employed by the Orleans Parish District

* * *

[p.887] appointed as the Chief Assistant District Attorney, and stayed there till I left at the end of '88.

Q. And why don't you tell the jury about the second time you worked there, starting in 1995, I believe you said?

A. The second time, well, the first time I left to accept a job at the District Attorney's Office in San Francisco at the end of 1989 primary because I was going to California to assume the care of my disabled sister. The second time I began in 1995, and I came back and was appointed special prosecutor. Some of my personal business brought me here. I stayed with Mr. Connick for two years, 1995, 1996. And in 1997 I left because Mayor Marc Morial invited me to become a member of his cabinet as the commissioner of criminal justice, and I stayed in that position until the year 2000, when I returned to San Francisco.

Q. As you know, this case focuses in on the period 1984-1985. I understand from what you've said, '84, '85, '86, you were the chief of trials?

A. That's correct.

Q. What were your duties as chief of trials in 1984-85?

A. As chief of trials, it was my job on a day-to-day basis to monitor and to provide training and checks and balances and evaluations for every section of court, every felony section. And in some cases for magistrate cases although those were usually under a separate supervisor. But if they were related to the felony cases in our Trial Division, we also, we also looked [p.888] at that. But I was responsible for the training of the trial assistants at that time.

Q. Would you explain to the jury what you did with respect to training?

A. Yes. With respect to training, Mr. Connick had developed a system of tremendous checks and

balances, all the way from when the case came into the system until the case went out of the system. And I got the case, the Trial Division got the case from the Screening Division. By the time we got the case, 50 percent of the cases had already been refused by the Screening Division because there wasn't sufficient evidence. And one of Mr. Connick's primary policies, and something that he changed from his predecessor was that people should not languish in jail while they are waiting for a case to make its way through the system, only to find out that at the end it doesn't have enough evidence. And the predecessor, and many, many other DAs in the country, I know, because I have visited and spoken with many, their system was to accept every case that came in the door, and wait until it got into the trial sections, and some trial attorney would say, oh, wait a minute, we don't have the evidence. So that was not our system. So the Trial Division got approximately 50 percent of the cases that the police brought to the office.

What I did, because we had a young staff, I relied on the junior/senior rolls in the trial sections, but I knew that I [p.889] could not rely solely on that, so we developed a system of pretrials. Every case, before it went to a jury, and before it went to a judge trial, if it were a felony case, had to be pretried with me. That was not, that was not an easy task. It wasn't a pretty task for the trial attorneys. Sometimes they were still sitting outside my office at 8:30 and 9 o'clock at night waiting for their pretrials, but they pretried their cases and their cases had to be signed off by me or by the deputy chief.

So when the pretrials occurred, there was a checklist of, I would say, 70 items. I looked at one the

other day, a blank one. That covered just about every aspect of trial. What the evidence was going to be, what the lab reports were, who the witnesses were, what the problems were that they could identify. Everything was covered. And then it was signed off on.

And we had, we had a maxim, and the maxim was you are not going to get in trouble if you lose a case, but you will get in trouble if you're not prepared for a case.

And the trial attorneys all knew that if they went to trial by hook or by crook and I did not know that they were going to trial or the deputy chief didn't know, they were doing it at their own risk if they had not pretried it. And there were occasions when people wouldn't. They felt that in the press of time and the excitement of the moment, they were ready.

Another training that we used was Saturday morning [p.890] sessions. We would probably have been charged with abuse if, if there were an agency that looked over young DAs because they worked at night, they worked all day, they worked on Saturdays. They worked on Sundays. Sometimes with judges, they worked until 11 o'clock, 12 o'clock at night.

So we would have Saturday sessions. And Saturday sessions were designed to give special trainings when they were needed. The Louisiana Highway Patrol came in to show us what a machine really looked like so that when we had a DUI, we knew what a calibrated machine really was, rather than just read about it in a report.

We had specialized training on rape cases. We would have medical people in to train us on rape cases. And in -- on many Saturdays, what we did was come in and have all of the murder cases, homicide cases and all of the rape cases that were pending trial and that were likely to go to trial in the next month, we would bring them in and we would have everyone there and we would go over them. We would identify problems, we would talk about them. We would try to solve them. We would talk about the best pairs to try cases. Screeners would come, people like Jim Williams, and would help out, would train, and would volunteer to assist on some of the cases that the trial, the Trial Division people had.

So we had, we had developed all of that. We also had developed a post-trial conference for cases that were tried and [p.891] lost. So that it didn't just count as a loss against the person, but that that person who was usually extraordinarily depressed, and especially if they had a grieving victim of some kind, but it gave them a way to learn from what had happened. And we tried to do it in a positive way. So we had a lot of other training mechanisms.

I came in believing in education. I had, prior to law school, taught at the Xavier University, Loyola University, Tulane University, and LSU at various times.

Q. Contention has been made that the supervisors at the District Attorney's Office did not understand *Brady*. What's your understanding of what the requirements of *Brady* are? Do you know?

A. The requirements of *Brady*, as I have always understood them, is to turn over evidence that is favorable to the defense and might show that his innocence or might mitigate his crime or might reduce his sentence.

Q. Now, when did you first learn about *Brady*? Was it at the DA's Office, was it at law school? When was it?

A. I learned about it in law school.

Q. Do you remember what specific courses in law school you might have learned about *Brady*?

A. Criminal law, constitutional law, constitutional criminal law, criminal law and procedure.

Q. Now, you talked about various types of training, training [p.892] junior/senior training, pretrying before you as chief of trials, you mentioned Saturday training sessions. Would *Brady* come up during any of those sessions?

A. Yes. Yes.

Q. Would you explain to the jury how it might come up and what might be discussed?

A. There were times when I had trial attorneys approach me and come into my office and say, I've got this, I don't know whether I need to turn it over or not. And that was understandable because even though they knew about *Brady* and I knew about *Brady*, and that it was a 1963 case and it regarded fairness and due process of law, and that they had to abide by it, they sometimes needed a little help or more than a

little help in trying to figure out if they should turn it over.

Everyone in the office was available for that kind of discussion. And it was, it was just as good for them, sometimes they went to Mr. Connick, and he would tell them. I can remember one specific case where he told someone to turn over evidence. I have told people to turn over evidence. I have sometimes said, no, you don't have to turn that over. That is not exculpatory or it is not *Brady* for any other reason so don't turn it over.

Q. Now, were you ever involved in any hiring of Assistant DAs?

A. Yes. I helped devise a panel interview system. At first, things came so fast and furious and we had so many cases that it was difficult to have what you would look at as, like, an [p.893] established training where we had to do -- you know, I tried to get an orientation started for new DAs, but they came one this week, and three next month. And it was rather difficult, and then we needed them right away to try the cases. But I tried to, we tried to develop systems for everything. And we tried to, we did develop a very good system for hiring. Instead of saying, okay, now you're going to go and interview with the chief of screening and next week you're going to interview with the trial chief, which is sometimes how it happened in the beginning, we devised a panel and we got several of the chiefs together at one time to interview people. And I -- and after a while, we also, we realized that we didn't need to just ask questions and find out if they were going to be, look like they were going to be comfortable in the courtroom. But we also had to find

out if they could write, even though they had been to law school. So we devised a writing sample aspect of the interview process. That writing sample never changed after it was instituted. It was always that they were asked to, the candidate was asked to write an essay on the exclusionary rule and another essay on *Brady* material.

Q. So before you even hired them, they had to write an essay on those topics?

A. That's correct.

Q. And when was that process in place?

A. You know, I traced it all the way back to Camille Buras in [p.894] 1986. And I think that I had put it in place in 1984 or 1985. I cannot, I know it was there from '86 all the way to the end of Mr. Connick's tenure. Every single candidate wrote that.

Q. Let's talk a little bit about supervision in the office. As I understand it, you had the District Attorney, directly under the District Attorney, you had first assistant and then below that level, you had a number of division chiefs, might be chief of screening, chief of trials, chief of juvenile, chief of appeals, et cetera?

A. That's correct.

Q. Now, below that level, let's say chief of screening, there would be homicide screener, robbery screener, various types of screeners; correct?

A. That's correct.

Q. And under trial section, that's where the bulk of the attorneys were; correct?

A. Yes.

Q. So you would have junior assistants and senior assistants and they all, in that section, they all reported to you?

A. Right. And in some sections where cases were tried, every single day and sometimes twice a day we would put three people. So once in a while we had a senior or pro seniors. We didn't always have the perfect hierarchy because with the experience sometimes we had two people who had only had a year's experience in the same section.

[p.895] Q. Is it fair to say that everyone below the level of the District Attorney had an immediate supervisor?

A. Yes. Absolutely.

Q. Is it fair to say that everybody knew who their supervisor was?

A. Correct.

Q. Now, are you familiar with a written policy, manual or handbook of the District Attorney's Office that was devised on or about February 1, 1987?

A. I am.

Q. Did you have any involvement with that, and if you did, would you explain it to the jury?

A. I did. I tried to collect all of the various sections that described what the various sections of the District Attorney's Office did. We had a section on screening. We had a section on trials. We had a section on pretrials. And we assigned it out to various people and then I was given the task of getting it back in, and trying to maybe edit it, put it together and get it to the chief assistant.

Q. Now, although the manual is dated February 1, 1987, is it fair to say that certain of the policies were developed prior to that time?

A. Absolutely. They were developed, some of them were developed very early on in Mr. Connick's tenure.

Q. Now, when you came back to the District Attorney's Office in [p.896] 1995, you were a special prosecutor. What did you do in that regard?

A. In that regard, I handled outreach into the community for Mr. Connick at that time, some victim/witness duties, and also trying to gain funding and to lobby various aspects of the community and instruct various aspects in the community on drug testing in schools.

Q. Were you personally involved at all with respect to the Thompson case?

A. Not at all.

Q. During your entire tenure with the District Attorney's Office, were you ever accused of withholding evidence?

A. Never.

Q. During the time that you were with the District Attorney's Office, the two times, did you ever know of a policy by Harry Connick to disobey *Brady*?

A. A policy, would you -- am I hearing you right?

Q. It was too many words. Let me rephrase it.

During the two times you were with the District Attorney's Office, did you ever know Harry Connick to have a policy which says, don't follow *Brady*?

A. No. That is the farthest thing from my knowledge and understanding of Harry Connick that I could conceive of.

Q. And what did you understand Harry Connick's policy to be with respect to *Brady*?

[p.897] A. Harry Connick's policy was to turn over material required under the law and under the *Brady* case, and overall and in general, his policy was to try cases fairly and not to prosecute if you didn't have the evidence and not to go forward if something happened to the evidence, but to dismiss or reduce. That's why he had a 50 percent refusal rate, which angered a lot of the police, but which, you know, we tried to help them understand the reason that we did it.

Q. I just have a few questions left. With respect to the making of policies for the District Attorney's Office, including policies with respect to *Brady*, who made such policies for the District Attorney's Office or Orleans Parish?

A. Mr. Connick.

Q. Do you know of anybody else, Mr. Dubelier, Mr. Williams or anybody else in the office who made policy?

A. No one else made policy. We would follow Mr. Connick's direction or if we thought that there was an area that needed some policy improvement or some policy that did not even exist, we would go to Mr. Connick, discuss it with him, and then draft it and submit it to the chief assistant and then it got to Mr. Connick.

MR. AARON: I have no further questions at this time, Your Honor.

THE COURT: All right. Mr. Banks.

MR. BANKS: Yes. Thank you, Your Honor.

* * *

[p.901] Q. When you were chief of trials?

A. Yes. But I think that someone else was also there. We had several chiefs of screening, who I think was Mr. Larson, Mr. Dubelier, Mr. Harper. During that general time, so I --

Q. But am I right, though, that Dubelier was a chief of screening, and at some point after he ceased to be a chief of screening, you moved into that position?

A. No, prior to him.

Q. Oh, prior to that him. Okay. I see.

I think you described and tell me if I am wrong, this process of pretrying cases as a check and balance; is that right?

A. It was checks and balances. It was training.

Q. What does that mean, checks and balances?

A. That means, to me that means really it's kind of an awkward way of saying accountability. It was to provide accountability in a system that in -- is -- in other jurisdictions might be a little bit prone to, to not having all the accountability factors in place.

Q. And accountability included accountability for the obligation of the District Attorney's Office to produce *Brady* material; right?

A. Correct.

Q. Do you know whether either of the prosecutions against Mr. Thompson, the carjacking case, or the homicide case was pretried?

[p.902] A. I am not familiar with that case or how it was tried.

Q. If Mr. Solino had testified earlier in this case through deposition excerpts that those cases were not pretried because the people handling them were not required to pretry cases, would you have any basis for knowing whether that was true or not?

A. I have no basis for knowing.

Q. But would you agree with me that if the cases weren't pretried, one of these pieces of this check-and-balance system that you had put in place just wasn't followed if that's correct?

A. Are you talking about people in the Screening Division?

Q. I'm talking about whoever tried the Thompson carjacking case and the Thompson murder cases, if those weren't pretried, would you agree with me that one of the checks and balances that you had designed was not applied to those trials?

A. If they were in my division, that is absolutely true. I designed that primarily for the Trial Division. When attorneys got to screening, they were always more experienced. They had been through the trial sections almost universally, and had a great deal of experience trying cases. When I was the chief of screening, we pretried cases.

Q. I think you said the trial attorneys sometimes asked you or others senior in the office questions about *Brady*?

A. Yes.

Q. About what they had to produce?

A. Correct.

[p.903] Q. They would sometimes come to you and say, I'm not trying to quote, something like Ms. Bane, or I suspect they called you by your first name, I've got this

piece of evidence here, I'm not sure whether I have to produce it or not; right?

A. That's usually what it was, yeah.

Q. And you talked them through it; right?

A. That's correct, Mr. Banks.

Q. Sometimes you expected that a young Assistant District Attorney or any Assistant District Attorney may not know the answer to that question without talking to someone like you; right?

A. Well, that's how it happened. That sometimes they didn't quite know.

Q. But merely because a District Attorney or Assistant District Attorney, I'm not talking with Mr. Connick, merely because an Assistant District Attorney graduates law school and learns about the *Brady* case and criminal procedure of the Constitution, that doesn't necessarily make that person qualified to answer every *Brady* question that comes along, does it?

A. No, it does not.

MR. BANKS: I don't think I have anything further, Ms. Bane. Thank you very much.

THE COURT: Any redirect?

MR. AARON: No, sir.

THE COURT: Okay, Ms. Bane. Thank you.

[p.904]

* * *

VAL SOLINO

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: Val Solino. V-A-L, S-O-L-I-N-O.

* * *

[p.906]

* * *

Q. Do you recall testifying at a deposition in this case?

A. Yes, I do.

Q. That was, we got together in an office, I believe it was Mr. Goins' office and we asked you some questions under oath? Correct?

A. Yes, I remember that.

Q. And you were not just what we call a "fact witness." You [p.907] were a designated representative of the District Attorney's Office; is that right?

A. I believe that is correct, yes.

Q. Does that mean, Mr. Solino, as you understood it that we asked the office of the District Attorney to

designate a witness who would be the official voice of the office, the person whose testimony would bind the office on certain issues?

A. If that's the legal significance of that, I'll take your word for it. Yes.

MR. BANKS: I'm going to show you, Your Honor, I don't think we've marked this before, it's just a copy of the 30(b)(6) designations. May I hand that to Mr. Solino?

THE COURT: Sure.

MR. BANKS: And I believe it would be 139, to mark it.

EXAMINATION

BY MR. BANKS:

Q. Mr. Solino am I correct that this notice lists the topics on which you were the official spokesperson for the office?

A. Yes, that's what it appears to be.

Q. And if we look down the first page, it says the District Attorney's Office shall designate one or more officials, representatives or other individuals to testify with respect to the following matters specific to the time period of December 5, 1984 through May 8, 2003. And then it gave the first topic and that's the only one I want to identify right now. The topic is [p.908] the District Attorney's Office's policies, practices, procedures and training concerning the identification,

disclosure, and production of exculpatory evidence and/or evidence favorable to the accused, including, but not limited to, *Brady* material. Right?

A. You're asking me if that's what's printed on here?

Q. Yes, sir.

A. That's correct.

Q. So just to cut through that, you were the one the office designated to describe the office policy on *Brady*; right?

A. That's correct.

Q. All right. You understand the *Brady* rule, don't you?

A. I like to think I do, yes.

Q. When did you first become familiar with the *Brady* rule?

A. I can't put a time period on that. I'm sure -- I'm sure I absolutely heard about it in law school. Whether or not I became familiar with it before then, I don't know. But at least as of law school.

Q. Certainly during the entirety of your time in Mr. Connick's District Attorney's Office and even since Mr. Connick retired, you have worked with the *Brady* rule?

A. Well, I mean, I don't know what you mean when you say I have worked with the *Brady* rule. I'm familiar with what is generally referred to as the *Brady* rule. Yes.

Q. Let's explore that a little bit, given that you were the [p.909] designated representative. Is the *Brady* rule limited to producing exculpatory evidence?

A. No.

Q. What is exculpatory evidence, Mr. Solino?

A. Exactly what it sounds like. Any evidence that would tend to negate the guilt or prove the innocence of somebody who is accused of a crime, and it also encompasses impeachment information or other information that would tend to cast doubt on other evidence that may exist that was to be brought forward against a person accused.

Q. That's what *Brady* requires; right? But exculpatory evidence is evidence that just proves the innocence of the defendant?

A. That's right. If you want to limit it to just exculpatory evidence, yes.

Q. So *Brady* --

A. I thought you were asking a broader question.

Q. *Brady* is broader than exculpatory evidence. It includes evidence that might be used to impeach a witness and by that, it means evidence to show that the witness isn't telling the truth?

A. As I understand it, that's correct.

Q. That has been the law since 1972, when the *Giglio* case was decided?

A. I didn't come here prepared to call out dates, but it has been the law as long as I've been involved in criminal practice.

Q. You know that that's -- the *Giglio* case interprets *Brady* to [p.910] say that, though, don't you?

A. I know that what is generally referred to as the *Giglio* rule encompasses impeachment information that is beneficial to a defendant's cause or someone who is accused of a crime.

MR. BANKS: May I approach, Your Honor?

EXAMINATION

BY MR. BANKS:

Q. I'm just going to show you a copy of the *Giglio* case. I don't want you to get into it in any substance, I just want to ask you the date of the decision.

A. Do you want me to read it into the record?

Q. Just the date.

A. It's dated as decided February of 1972.

Q. So that was about two years before even Mr. Connick took office as the District Attorney in New Orleans?

A. Yes.

Q. *Brady* doesn't -- let me state this differently, sir. The *Brady* rule isn't limited to evidence that a judge requires you to turn over, is it?

A. Not in my understanding, it is not. From whatever the source, the ethical obligation is to disclose the information.

Q. Regardless of whether the defense requests it and regardless of whether the judge orders it to be turned over, your understanding under *Brady* is, if it is favorable to the defense the way you've described it, it must be turned over; right?

[p.911] A. That has always been my understanding, yes.

Q. I would like to show you something. It's a 1987 handbook. It's Exhibit 51. Would you put the first page of that up, please. Can you see this on the screen, Mr. Solino? I think it's probably up there in one of those books, if you need a better copy.

A. Well, I can see it, but I can't read it.

MR. BANKS: All right. Here we go. Your Honor, if I may approach and hand Mr. Solino just a copy so he can look at it.

THE COURT: That's fine. I assume you can blow that up, also, can't you?

MR. BANKS: I think my colleague can do that.

EXAMINATION

BY MR. BANKS:

Q. We've heard a lot about this policy. This is a 1987 policy, Mr. Solino?

A. Yes.

Q. Do you recall in the course of this case, we served certain discovery requests in the civil litigation asking the office of the District Attorney to produce documents; right?

A. That's my recollection, yes.

Q. And the person they asked to produce the documents was the same person they asked to testify as their official representative. That's you. You looked for policies; right?

[p.912] A. I believe so, yes.

Q. This was the oldest policy you found, this 1987 policy?

A. That is correct.

Q. And by 1987, you had been in the District Attorney's Office for about two years?

A. By 1987, I had been in the DA's Office for approximately a year and three or four months, yes.

Q. Now, I know you weren't here when Mr. McElroy testified and when Ms. Bane testified, so I can't ask

you to agree or disagree, but I'm going to make a representation to you and ask if it's consistent with your recollection. They said that in putting this policy manual together, there had been a whole bunch of memos and other policies that someone gathered and put them all together to create this manual. Is that your understanding?

A. I don't have a recollection of participating in putting this together. Only finding it, but my recollection would be that that's generally how the policy manual was. I believe it was done that way, so it could be supplemented from time to time without having to, you know, eliminate the whole book. You just replace the pages and the policies that needed to be undated.

Q. My colleague here, Mr. Vincent, is going to put up on the board Section 5.25, which I think we've heard and agree is the section dealing with *Brady*. And that is on page, well, let's put it up and we'll get a page number. It may be tagged in your copy, but it's page at the bottom 427, if that makes it easier [p.913] for you, or you can look at it on the screen. We've blown it up. Okay? Can we blow that back up? It went away.

This is the section of the handbook dealing with *Brady*; right?

A. That's what it says, yes.

Q. If someone pulled all the memos and the policies together, this is what they got; right?

A. I believe that that's the way this works, yes.

Q. The first statement, the first sentence, rather, that's not a full and complete description of what *Brady* requires, is it? You can read it to yourself. The jury has heard it a number of times.

A. Can I get that question again?

Q. Sure. This isn't a complete and accurate statement of everything that *Brady* requires, is it, the first sentence?

A. The first sentence?

Q. Yes.

A. No, I wouldn't say that that completely describes the *Brady* responsibility, no.

Q. In other words, this first sentence of 5.25 talks about requests from defense attorneys resulting in orders by a judge that material be produced, but you said before, *Brady* is much broader than that; right?

A. Yes.

Q. And there's nothing in this first sentence or anywhere in [p.914] this paragraph about impeachment material, the 1972 *Giglio* rule?

A. It doesn't reference *Giglio*. It doesn't include any reference to impeachment.

Q. Let me ask you: You understand that one of the issues in this case involves a crime lab report that surfaced in 1999. It was originally a crime lab report

from 1985, but we learned about it in 1999. You know that; right?

A. Yes.

Q. Let me ask you a question under this policy. Suppose an assistant district attorney was sitting there in 1985 holding this 5.25, this policy, and he had in his hands a crime lab report that showed that there was blood evidence from the scene of the armed robbery and that that blood evidence was tested and it was type B and he knew that it was the perpetrator's blood, but he didn't know whether it was the criminal defendant's blood type or not. Would there be anything in this policy, the 1987 handbook, that would have told that Assistant District Attorney you must produce that crime lab report?

A. If I'm understanding you correctly, the hypothetical is that the prosecutor does not know the person on trial's blood type?

Q. Yes. That's exactly what I asked. Just based on this 5.25?

A. Well, in that case, it doesn't seem to me it would be exculpatory until he knew it was exculpatory, if he didn't know the blood type.

Q. So if you were sitting there as an Assistant District [p.915] Attorney in 1985 and you were looking at this handbook, which I know didn't exist yet so it's a hypothetical, you were looking at this handbook to figure out do I have to produce this crime lab report under the circumstances I just described, you might think I don't have to produce it; right?

A. Well, if you are asking what I would have done in 1985, I wouldn't have been resorting to this.

Q. No, that wasn't my question. My question is if one were looking at the handbook for guidance?

A. Well, this is -- this is not clear. It says in most cases, but if you want me to -- if you want me to say that your question is accurate as to your conclusion, I guess it would be. If this is the only thing a person was going to go by.

Q. Now, do you think by any chance that two years before this first handbook that you found there was a broader written policy statement in the office as to *Brady* requirements and obligations?

A. I don't recall if there was or if there wasn't.

Q. Do you recall when you testified in this case in your deposition as the designated representative of the office, the voice of the office, whether I asked you about the blood report issue?

A. When you asked me about it in what context? It certainly came up, I recall.

Q. Well, whether I asked you about whether that report was a *Brady* obligation, *Brady* -- let me rephrase that. That was very [p.916] inartful.

Do you remember me asking you your views as the official representative of the DA's Office whether you thought that blood report was *Brady* material?

A. I believe the issue came up. I can't sit here and tell you I have a specific recollection of you asking the question.

Q. Let's try to refresh it. The crime lab report we know was prepared on April 9, 1985; right?

A. I'll take your word for it, yeah.

Q. That was two days before the carjacking trial, the armed robbery trial? Will you take my word for that, too?

A. (Witness nods head affirmatively.)

Q. Right, sir?

A. Yes.

Q. And that report showed that the blood from Jay LaGarde's pant leg had been tested and a definitive and conclusive result was obtained; right?

A. Uh-huh (affirmative response).

Q. Anyone who read that report on April 9, 10 or 11 would know that that piece of bloody pant leg was type B blood; correct?

A. Yes.

Q. So that the perpetrator was either -- well, let me, again, reword that. That piece of evidence would have been potentially very important in the case, wouldn't it?

A. Correct.

[p.917] Q. In other words, in a case where all you had was an eyewitness identification by three teenagers, that piece of evidence could have been helpful to the prosecution if Mr. Thompson had type B blood?

A. Yeah. That's correct.

Q. But, on the other hand, if Mr. Thompson did not have type B blood, it could be conclusive evidence of his innocence; right?

A. That's correct.

Q. Was it your view under *Brady* that in that circumstance on April 9, 1985, that if the prosecutor holding that blood report did not know Mr. Thompson's blood type, he could just sit on that report and do nothing?

A. You're asking a question in a very roundabout way. Let me answer it like this. I would have expected a prosecutor to turn that lab report over, period. That's what I would have done and that's what I would expected them to have done under the policy in the office as I understood it at the time.

Q. Let's go to your deposition testimony. Page 221, Line 18, unfortunately we don't have it on videotape, but we do have it on the screen.

A. What was the page number again?

Q. 221, Line 18. And could we blow up from Line 18 to the bottom. I'll read my question and then we'll get

your answer. My question, Mr. Solino, is yeah, okay. I wasn't very artful, but here's my question:

[p.918] "Just based on your understanding of the *Brady* rule, if the prosecutors in the armed robbery case had had the crime lab report, but did not know whether it matched Mr. Thompson's blood type, would they have been obligated to turn it over to the defense?"

And let's hit the next page for your response.

"ANSWER: If your question is to use me as an example, if I'm holding a crime lab report that says blood on a shoe is B, and I have some reason to believe that the blood on the shoe came from the perpetrator, and I don't know what the perpetrator's blood type is, do I feel I have a legal requirement at that point to disclose that lab report? No."

That was your answer; right?

A. That's correct.

Q. Did you know that even Mr. Connick said he thought *Brady* would have required this to be turned over in that circumstance?

A. Well, what you have written up there, says, I say, at that point. Okay.

Q. When would it have had to be turned over?

A. Let me finish my answer, please.

Q. Yes, sir.

A. Because all along at the deposition and even today, the suggestion was that you weren't trying to trick anybody or bait anybody into an incorrect expression of their opinion.

Q. No, sir.

[p.919] A. I understood that question at the time and understand it now to be I'm holding a report in my hand right at this minute, what do I do with it. And my answer there, which is why I said at that point is what I would have done. Nothing. What I would have done one minute or one second later, was go out and try and find out if there was a next step to be taken. Is there a blood test to be done or I would have made an effort to find out if it was exculpatory or not, which probably would have included having turned it over. But the very second that I find out about it, I mean, I'm going to do a few more, I'm going to attempt to do some additional research before I will conclude it is *Brady*. But I have no doubt in my mind that this lab report should have been turned over and I would have turned it over, had it been me.

Q. I don't think you said that in your deposition, did you?

A. Well, these folks can read it and draw their own conclusions.

Q. Yes. Okay. Let's go back to 1985. The people who knew about this lab report, whoever knew about this lab report, you think, should have turned it over, notwithstanding whatever you said in your deposition; right?

A. Are you asking me should they have turned it over?

Q. Yes.

A. They should have made it known, yes.

Q. Were you part of the group in the office that convened the Grand Jury investigation in 1999 relating to the Thompson

* * *

[p.921] A. -- process began?

Q. Yes. Before the Grand Jury was convened and began to hear testimony.

A. What do you mean convened and began -- are you talking about in the days leading up to preparing witnesses to go to the Grand Jury or are you talking about -- what exactly are you asking?

Q. Forgive my imprecise terminology. I was never a DA. Is there some point where the Grand Jury convenes or gets together for the first time to hear evidence?

A. That is correct, yes.

Q. And if I represent to you that that was May 6th of 1999, you wouldn't have any basis to disagree with that, would you?

A. No.

Q. Before May 6th of 1999, do you know whether Jerry Glas did any research on the legal issues relating to this investigation?

A. Again, I do find that your question is very inartfully asked. Are you asking me -- if you are asking me when the decision was made to begin a Grand Jury process here, if I contacted Jerry Glas, explained to him the situation, and in the days leading up to the first Grand Jury session, did Jerry Glas do some research on these issues? I don't have a specific recollection of that, but he may very well have, and if he did, he probably did it at my instruction.

Q. We had some testimony from a prior witness, Mr. Connick, [p.922] about statute of limitations and prescription. Do you recall any research being done on that or any discussion with Mr. Glas?

A. I recall that was an issue, and I'm sure Jerry and I both did research on it. I don't have a specific recollection of it, but I do recall it was an issue.

Q. And maybe you can explain this to the jury a little bit again, I may be guilty of using imprecise questioning, but prescription and statute of limitations, was that a way of looking into the question of whether these events had occurred so long ago that it was too late in 1999 to bring criminal charges against former prosecutors?

A. Well, prescription is a Louisiana term that describes the statute of limitations, which means if a statute of limitation is applicable and it has vested, then you can't charge criminal behavior. And it would have been part of a routine screening process in this

type of case or somebody who would have been charged with a $200 theft for the attorneys handling it, if the case were aged, to consider whether or not prescription had vested. And that is, I'm sure that is an undertaking that we reviewed in this particular case.

Q. Did you reach a conclusion at that time that there was a legitimate argument to be made that these charges were not prescribed, meaning they were not untimely?

A. My recollection, although I honestly will tell you I do not recall all of the rationale sitting here all these many years [p.923] later, was that I had personally concluded that there was an argument to be made that prescription had not vested in these cases. If there was, if there was criminal act, a criminal act to be charged, I did not think it would have been prescribed by the statute of limitation.

Q. So you didn't tell Mr. Connick, no way can we bring indictments here because these charges would be prescribed?

A. I don't recall that type of a specific conversation. It's not the way I would have talked to the DA. If it came up at all, I'm sure I would have expressed my opinion, and that would have been the end of it.

Q. You and Mr. Glas prepared indictments for the Grand Jury against Mr. Williams and Mr. Whittaker, didn't you?

A. I don't have a recollection of being, of actually preparing paperwork. It very well may have been done. It would have been the type of thing that we

would have been, that we would have done as just to be prepared so that we wouldn't have been caught at the last minute not having something that we thought we may have needed, but I don't have a specific recollection of that.

Q. But you don't recall to the contrary, either?

A. That is correct. And I'm telling you right now, it's something that would have been in my nature to have done, just as, just to get the work done out of the way. Whether we intended to use it or not.

Q. You were present on May 6th, the first day when the [p.924] Grand Jury heard testimony, right?

A. Again, I don't have a specific recollection, but I believe I was there. I would have been there, I should have been there. My recollection is that I was there.

Q. The Grand Jury was scheduled to come back a second day a week later to hear more witnesses; right?

A. I recall there was more than one session and the Grand Jury meets once a week, yes.

Q. There were additional witnesses subpoenaed for the second session to come in and testify?

A. There were witnesses scheduled to come in. I do not have a recollection as to whether or not we actually served subpoenas on these people or if the individuals, based upon our contact, came in without a subpoena. I don't recall subpoenas. There may have been, but I don't recall.

Q. There was a meeting in Mr. Connick's office the night before the Grand Jury was to hear its second day of testimony; correct?

A. That, I do not recall.

Q. Do you recall a meeting in Mr. Connick's office at all?

A. I recall a meeting with Mr. -- in Mr. Connick's office, but I don't recall it to be before the second day, the second Grand Jury session.

Q. Do you think that's incorrect or you just don't recall one way or the other?

A. I believe it to be incorrect. I think we had at least two [p.925] sessions before we met in Mr. Connick's office. I could be wrong, but that's my recollection.

Q. You do recall there to be a meeting in Mr. Connick's office with you, Mr. Connick, Mr. McElroy, Mr. Glas, who else?

A. Yes.

Q. Anyone else?

A. I believe Bill Wessell was present.

Q. He was not a District Attorney or Assistant District Attorney, was he?

A. He was not, he was not a warranted or commissioned Assistant District Attorney at that time to my knowledge.

Q. And at that meeting, Mr. Connick announced the decision he was shutting down the Grand Jury. He was not going to allow the Grand Jury to hear any more evidence; right?

A. There was a meeting where all those people were present as you've described, and a decision was made by the DA to not -- to not allow the Grand Jury to reach, to deliberate on the issue.

Q. Do you recall Mr. Connick saying at that meeting, not only was he not going to seek indictments and ask the Grand Jury to deliberate, he wasn't even going to allow any more Grand Jury testimony?

A. I don't recall that, because my recollection is there was no one left to testify. That's my recollection.

Q. Are you certain of that, sir?

A. I can only be as certain as my recollection serves me, and [p.926] my recollection is that everyone we had identified as a pertinent witness had testified. If you can provide me with a name of somebody who was left, maybe it will jar my memory, but my recollection is we had a couple of sessions and everyone who had pertinent information had made a presentation to the Grand Jury.

Q. If Mr. Glas were to testify to the contrary, do you have any reason to doubt his recollection?

A. I'm not going to comment on what anybody says. I'm telling you what I recall. If Mr. Glas calls out a name as someone who was left to testify, and you want to repeat that name to me now and it jars my memory, I

will stand corrected. But as of now, I will tell you, I do not recall that there was further testimony to be taken.

Q. There's been some reference here to a public hearing in 1999, a public hearing in front of Judge Quinlan who had tried the Thompson cases. You recall that; right?

A. Yes, I do.

Q. Mr. Connick described that hearing to this jury. Do you recall how that hearing came about?

A. If it's the same hearing that I'm recalling, I believe we had filed a motion to set aside Mr. Thompson's conviction, and presented it to the judge in the armed robbery case. The judge refused to just grant the motion and insisted on having a hearing and to bring all of the witnesses in and have them testify on the record. As a result of that, there was, in fact, a hearing at [p.927] the conclusion of which the judge granted the motion, which we had filed.

Q. So it wasn't you or Mr. Connick asking for a public hearing on this; right?

A. I remember very vividly it was Judge Quinlan who insisted on having this hearing.

Q. So the motion you had filed, you asked for Judge Quinlan to decide without a hearing, but he said, no, we're having a hearing; right?

A. I don't remember if the motion had language in there Judge Quinlan decided without a hearing. We

presented the facts as we understood them and represented to the judge that the right thing to do, based upon the information that had been -- come to our attention, was to set this conviction aside and we asked the judge to do that.

Q. The Grand Jury proceedings were secret, right?

A. Well, they are all, by law they are secret in Louisiana.

Q. But by choosing to do an investigation through a Grand Jury, it kept Mr. Cooney or me or Judge Barbier or this jury from hearing what went on in that course of that investigation; right?

A. I would say that that is not suggesting a correct impression to this jury because virtually everyone that testified at that Grand Jury were people that Mr. Thompson's attorneys were well aware of and in some cases had provided us access to so that we didn't have to go through a long process of finding them, and I [p.928] will state right now for this record that I doubt there is not one iota of doubt in my mind that Mr. Thompson's attorneys knew everything that was presented to that Grand Jury from the independent sources or from Jerry, myself, or perhaps Tim McElroy who explained everything to Mr. Glas, to you, and to Mr. Cooney. At that point, I don't think there was much -- that there was an issue with transparency at all, but at that point, there certainly was no curtains there. Everything that we knew, you guys knew, and you knew it virtually the same time that we did.

Q. Did you tell us what witnesses actually testified to in the Grand Jury hearings?

A. I don't believe that that is something that, by law, that we can disclose, if my memory serves me correctly, but --

Q. Right.

A. -- there was no secret about the people that were being called because, as I recall, you guys were talking to them as well.

Q. But what those witnesses actually said in the Grand Jury room under subpoena would not have been something that we would have been entitled to find out, would it?

A. That is correct. And that is something by law that as a, that anybody who is a participant in those Grand Jury proceedings are prohibited by law from disclosing.

Q. And the only public proceeding in 1999 on this was the hearing ordered by Judge Quinlan; right?

* * *

[p.931]

* * *

JOHN JERRY GLAS

was called as a witness and, after being first duly sworn by the Clerk, was examined and testified on his oath as follows:

THE WITNESS: John Jerry Glas, Jerry with a J and Glas with one S.

DIRECT EXAMINATION

BY MR. BANKS:

Q. Good afternoon, Mr. Glas. Some prior witnesses have referred to Jerry Glas. I take it that's you?

A. Yes, sir.

Q. Tell us what you do for a living, sir.

A. I'm a partner at the law firm of Deutsch, Kerrigan & Stiles.

Q. What kind of practice do you have?

A. I do insurance defense, product liability.

Q. Litigation?

[p.932] A. Yes, sir.

Q. What is your educational background, starting with college?

A. I went to college at Holy Cross in Worcester, Massachusetts. I'm from here. I was allowed to go there because it's a Jesuit school and I got a degree in philosophy. Then I went to University of Toronto, I got a master's in philosophy. Came home to New Orleans, I taught religion for a year at Jesuit High School and then I went to LSU Law School.

Q. When did you graduate law school?

A. I graduated law school in 1996.

Q. While you were in law school, did you have any ideas what you wanted to do when you got out?

A. I always wanted to be a prosecutor.

Q. Why?

A. Well, I always wanted to be a prosecutor. I was from here. When I went to law school, I did well in criminal law. I got to be the law clerk for Professor Cheney Joseph, who was the criminal law professor. I got to help him rewrite the criminal jury instructions for Louisiana. And then my last year in law school, that last summer, I interned for the Judge Advocate General and I got to work in the Criminal Law Division at the Pentagon for the summer.

Q. When did you graduate law school?

A. I graduated in 1996, and then I went to clerk at the DA's Office here in New Orleans.

* * *

[p.934] to be immodest.

A. I was consistently promoted and I was allowed to try any case I wanted.

Q. I know, I think you weren't here when Mr. McElroy testified about you before, but did you receive any commendations or praise from Mr. McElroy himself when he was the first Assistant District Attorney?

A. I didn't have a lot of, I didn't have a lot of interaction with Mr. McElroy. The only time I would

have any sort of feedback from him, every time you did a trial, a jury trial, you had to submit a report after the trial, and that would go up to Mr. McElroy, and he would jot notes on the paper and send it back down. When they made me a Senior Assistant District Attorney, they issued a little memo to the firm, to the office telling me that I had been promoted, but that's about the only interaction I had with him.

Q. I'm going to show you a copy of that memo. I ask that we mark it as Exhibit 140. What is that, Mr. Glas?

A. This is the memo that they issued when they made me a Senior Assistant District Attorney. It goes through and it tells how long I've been Assistant District Attorney, how many jury trials I've done, how many judge trials I've done.

Q. How many trials did it say you had done by that time?

A. Well, this is by August of 1998, so this is one year after I had gotten to felony trials, less than a year and by then I had [p.935] done 52 jury trials and 32 judge trials.

Q. And there's a handwritten note on the bottom?

A. Yes, sir.

Q. Who wrote that?

A. I believe that's Mr. McElroy.

Q. What does it say on there?

A. Congratulations, John Jerry, your dedication is appreciated.

Q. I would like to show you another, I'm sorry, what's the date of the memo again?

A. August 25, 1998.

Q. I would like to show you Exhibit 141. Tell us what 141 is, please, Mr. Glas.

A. This is a list of the jurors on a, this was a death penalty case that was going to go to trial. During voir dire you fill this out to see who you're going to select and at the end you submit it along with everything else. Mr. McElroy had a habit when you won, he would put three stars like he did on the memo you showed me before. He would put three stars, circle your name and then he'd write you a note at the bottom of the page.

Q. What note did Mr. McElroy write to you at the bottom of the page?

A. For this case, he wrote, outstanding performance by a rising star.

Q. Did Mr. McElroy ever criticize your performance or dedication or professionalism during the time you were an

* * *

[p.938] Q. Did Mr. McElroy tell you what your role would be in that investigation?

A. Mr. McElroy and Mr. Solino had a problem because they had already talked to Bruce Whittaker, I don't see it here, but the crime lab report is always addressed to an Assistant District Attorney, usually to the one who requested it. And so it said Bruce Whittaker's name on it and by the time I went up there on Thursday, Mr. McElroy and Mr. Solino had already spoken to Bruce Whittaker and he had already said things to them that were going to be important. And so I knew that they were going to be witnesses, they knew that they were going to be witnesses. And at that point, they asked me to be the point man to be in charge of running this down and finding out if this was real or not.

Q. If a witness came in in this Court and said your role in the case was minor, that you were just some young DA doing research and other minor tasks, would that be accurate?

A. That's not true.

Q. Were you the point man?

A. Yes. I asked Mr. McElroy if Val could assist me because I had never done a Grand Jury proceeding before. Actually, at that point we hadn't even talked about that. I just wanted Val to help me because he knew the case. Val had handled the appeal in for John Thompson in the murder case for years. He knew the case in and out. I knew nothing about the murder trial, I knew nothing about the armed robbery, so I said I would do it. I'd [p.939] drop what I was doing and do it, but I wanted Val to help me.

Q. So you asked Mr. Solino to work with you on this?

A. Yes. And we had done -- the same month, April that same year, Val and I had just done a first-degree murder trial together, *Douglas Whitten* trial, a four-count first-degree murder trial and we convicted him on all four counts. We worked well together, he was my supervisor, we were both in appeals, and we liked working together.

Q. Do you recall Mr. Solino's reaction at that meeting when the crime lab report was presented?

A. I think he was skeptical, too.

Q. Did he say anything about when would happen if an investigation wasn't conducted, if you guys didn't look into this?

A. I don't know, I don't know if Val said it or if I said it, but I will admit that one of my first thoughts was that if you guys really had found this and if it was real, then you would have held a press conference on the front stairs of Tulane and Broad and you would have told every newspaper, you know, in the country to show up. And that's why I thought that this was just a stall tactic. I didn't think it was legit.

Q. Do you remember in a day or two time frame after this meeting, joining Mr. Connick, Mr. McElroy, Mr. Solino and a newspaper reporter for a session to discuss this?

A. Yes, sir.

[p.940] Q. How did what happen?

A. Well, I spent the next day running down everything we needed to do. Went and got a copy of the crime lab report, the handwritten reports, talked to Walter Strata. The only thing I was not allowed to do was talk to Bruce Whittaker or any of the attorneys that were involved.

Q. Why?

A. Tim McElroy said that he would deal with Bruce Whittaker and that I was not to contact the attorneys. And so I ran down documents on Friday.

Q. So you were to interview other witnesses, chase down all other leads, but you were not permitted to contact the former Assistant District Attorneys, Whittaker, Williams, and Dubelier?

A. That's true. And so I spent Friday going through, I got the NOPD police report because I wanted to see if it mentioned the blood evidence. And it did not. So if a defense attorney had gotten just the NOPD police report, they wouldn't know that there was any blood evidence.

Then I went and I read through the trial transcript itself. I wanted to see, did this come up at trial, either the bloody shoe or the bloody pant leg, and it did not. When Gerry Deegan called crime tech Cusimano to the stand, the crime tech had done only four things. He took pictures, he did something else, oh, took pictures, grabbed the gun, grabbed the shoe and grabbed the pants leg.

[p.941] Q. Dusted for fingerprints on the gun?

A. Yes, right. But those were the four objects, the four things that he had to do. And Gerry Deegan's direct of him was, you know, "Did you seize the gun?" "Yes." "Did you take photos?" "Yes." That's it. So I knew that the pants and the shoe weren't mentioned in the police report, they were not mentioned at trial, and then we wanted to know what happened to them. There was a question of whether or not they had been destroyed. There was a policy at the court property room, they would destroy evidence after a certain amount of time if the appeal was over and everything else and there was a question if it was still out there. So we went to Central Evidence and Property on that Friday and we found the Central Evidence and Property card. I'll just briefly say, there are two property --

Q. Exhibit 17, but keep going, we'll put it up for the jury and you to take a look at.

A. There are two property rooms. There's the Court property room and then there is the police property room, so a lot of times when you have police officers collecting evidence out at the scene, they will log it into the police property room, it will be assigned a number. In this case of John Thompson's armed robbery, there were seven, E-1 through E-7. Then in the course of a trial, that evidence would be brought over usually by a police officer or by your investigator and then you enter it into evidence at the trial, court property room takes control of it, [p.942] they bring it down to the basement, which is where the evidence was stored, as we all know now, and it would be put into the court property room logbook.

So let's start at the beginning. So we went to the NOPD, what they call "CE&P," Central Evidence and

Property, and that's where we got the, went to the CE&P and we saw that Gerry Deegan had personally signed out all seven objects. And then the next question was, where were they? And for that, we wanted to go see Mr. Lombard and Mr. Warren Spears in the court property room to see if that had been put into the court property room. I knew it hadn't been shown to anybody at the trial. I knew it hadn't been entered into evidence.

Q. Well, tell us about that at the trial. If we look at the bottom of this card, you see where it says E-1 -- no, same part, E-1, one ban (phonetic) Wesson caliber blue steel revolver -- I'm paraphrasing -- a bullet jacket, et cetera, 1 through 7, E-1 through E-7. Am I correct that E-6 is the blood-stained piece of right pant leg; right?

A. Okay.

Q. E-7 was the tennis shoe?

A. E-7 is the tennis shoe, yes, sir.

Q. And E-1 through 5 were other pieces of evidence, the gun, the bullet jacket, the cartridge, et cetera?

A. Yes, sir.

Q. What was introduced at the trial?

[p.943] A. E-1 through 5.

Q. Do you remember which of the prosecutors introduced the evidence at the trial? Was it Mr. Williams?

A. I do not. Well, I know Gerry Deegan did the crime tech direct. I do not know who put in E-1 through 5.

Q. So one of the two prosecutors who was there actually moved into evidence E-1 through 5?

A. Yes, sir. And at that time it would have been -- the piece of evidence itself would have been marked with an exhibit sticker, starting with S.

Q. And Exhibits E-6 and E-7, the blood evidence never surfaced at the trial?

A. Yeah. That's never showed up at trial and when we went to the court property room, that's when we realized that it had not been, it had not been entered into the court property room, so Gerry Deegan checked it out at the police property room, personally signs for it and it never goes into the court property room. E-1 through 7 get checked out, E-1 through 5 goes in. And that night we met with Mr. McElroy, Val Solino and Harry Connick in Mr. McElroy's office to talk about what we had found. Val Solino called this the smoking gun.

Q. You mentioned a meeting with a newspaper reporter. Was that different from the one --

A. That was the same meeting. It was that night. So it's that, it's that Friday, that Friday night. That Friday night [p.944] they had Rhonda Bell come in, and this was after the decision had been made that -- we talked about this, what do you do? What do you do when you find something like this? And, you know, we could have sat on it or we could have, you know, given it over to you-all, given it to Rhonda Bell, gotten ahead

of the curve and been completely forthright. And Val Solino and I both were adamant that the way to go was for us to get out ahead of this and to find out exactly what had happened. And so Rhonda Bell came over and I believe this was one of the documents that was turned over to her. I know she wrote an article. I'm sure you can find that.

Q. Was there any discussion at that meeting about the possibility of using a Grand Jury to investigate?

A. That's when it was decided. We're trying to decide what to do. We want to talk to the witnesses. You can talk to witnesses and that's fine, but you're not going to have them on the record. You're don't have them subject to perjury. It's not being transcribed. So we were trying to figure out how do we get to the bottom of this and how far does it go? We know Gerry Deegan, but we knew -- I believe by then they already had the affidavit from Mike Riehlmann and in Mike Riehlmann's affidavit, as you know, he said that Gerry Deegan confessed that he had destroyed blood evidence in a case. And so we here we have him checking it out, we have the two pieces of blood evidence disappearing in his hands, and then we have the affidavit. And the question was does [p.945] it end with Gerry Deegan or does it go on? And I recommended or Val recommended or we both recommended that we do a Grand Jury probe. This is exactly the kind of thing that we weren't going to stand for, that we need to find out who was involved, what they knew, when they knew it. And one way to do it was to have a Grand Jury probe and Mr. Connick liked that idea.

Q. So he accepted your recommendation to use a Grand Jury to investigate this?

A. I don't know if it was my recommendation. He said he had one concern or one question.

Q. Now, this jury has already heard, Mr. Glas, about Grand Jury secrecy and I just want to know, because we're going to talk a little bit about this investigation. You do understand that what goes on in the Grand Jury room is secret?

A. Yes, sir.

Q. In other words, I'm not allowed to ask you what a witness testified to in that room?

A. Yes, sir. You knew that because I got a court order before I even talked to you or to the Office of Disciplinary Counsel or anybody else.

Q. And if at any time you think my questions are designed to avoid that, please tell me and I'll stay away, the judge will protect you because we're not going to ask you to violate the Grand Jury secrecy duty that you owe. Okay?

A. I won't, yes, sir.

[p.946] Q. All right. Very well. I want to focus instead on what happened in your discussions with Mr. Solino and Mr. Connick and Mr. McElroy and your interviews with witnesses and things outside the Grand Jury room. Is that all right?

A. Yes, sir.

Q. What was your role in the actual Grand Jury proceedings, the hearings? Don't tell us what people said, just what was your role?

A. Well, the first Grand Jury, it was a Friday night. The first Grand Jury -- Grand Juries meet on Thursdays, so we had until Friday until Thursday to find out as much as we could before we presented to the Grand Jury. And on the day of the Grand Jury, Tim McElroy did the director, asked questions of Bruce Whittaker. I handled all of the other witnesses. I think there were five or six other witnesses. That was my involvement.

Q. Was that consistent with your role of being the point man that you questioned most of the witnesses?

A. Yes, sir. You know, and I say I, I'm sure it was me and Val a lot of times, but, you know, I interviewed Mr. Lombard, Mr. Spears, Mr. Strata, I can go to the list. Mr. Bertel. We went through everybody, got all of the records and documents. Our only involvement with Mr. McElroy and Mr. Connick was reporting to them on that Friday night and then as we went.

By Monday I had -- Monday you have to issue your subpoenas to get people there on Thursday for the Grand Jury. So [p.947] I had to decide who we were going to call by Monday and I submitted that list by Monday, and then we were running other things down.

Q. The first day of Grand Jury hearings, the first testimony, was that May 6 of 1999?

A. It was that Thursday, yes, sir.

Q. Before that meeting, do you recall having any discussions with Mr. Connick about the issue of what we call "prescription"? The jury has heard a little bit about that.

A. Yes, sir. That, yes, sir.

Q. Tell us when that happened.

A. That first came up with Mr. Connick that meeting on Friday night, when the issue of using a Grand Jury to get to the bottom of this came up.

Q. I'm losing track of my dates. Is that Friday night, April 30th or --

A. Friday, April 30th.

Q. Friday night, April 30th?

A. We get the report on Wednesday, I get called up on Thursday, I spent Friday running down these things, finding the stuff, and then we meet with them Friday night. That's when the Grand Jury comes up and that's when he says, what about prescription?

Q. Had you researched that question, done legal research?

A. Yes, sir. I think Val and I both had at that point.

Q. Had anyone researched that other than you and Mr. Solino?

[p.948] A. No, sir.

Q. Tell us what you told Mr. Connick in response to his question about prescription, whether these events were too old to warrant potentially bringing criminal charges?

A. Well, you know, when you go and look in the textbooks and you're looking for cases, it's often, it's going to be hard sometimes because you're not going to find cases exactly like it. There was no case exactly like this. Going through, trying to find, it's easy if somebody, you know, commits a battery and so you have a certain amount of time, a number of months or a number of years to file a charge against them. But when you're talking about obstruction of justice or malfeasance in office, something that a person did while they were in office or while they were a DA that they hid, well, you don't, you don't know about it. So how can you charge them with having done anything because you don't know about it yet. So the question is when does the clock start ticking? Does it start ticking the day that -- if Gerry Deegan or Jim Williams or anybody, if they buried this report, does the clock start ticking that day or does it start ticking the day we find out about it?

Q. Does it start ticking, in your conclusion, did the clock start to tick for prescription if a crime occurred and you didn't even know about it? No one knew about it?

A. What I told Mr. Connick was that I didn't find anything directly on point. If you go to civil law, if a doctor drops a [p.949] sponge in someone's body and nobody finds out about it and three years later they find it, the clock didn't start ticking when he dropped it, it starts ticking when you find it. It's a principle

called *contra non valentem*. There are plenty cases on that, but it just doesn't come up that often in a criminal context. I couldn't find any Louisiana cases on point. But what I told him was this, I remember it very vividly. I said I cannot imagine a Louisiana Supreme Court Justice saying, if you hide blood evidence for more than six years, you're off the hook. That opinion was never going to be written. And when I told Mr. Connick that, he said, I agree, let's go for it.

Q. So he agreed with you that the charges were not -- that the matter was not too old to warrant charges?

A. Correct.

Q. How about Mr. Solino, did he agree?

A. Yes, sir.

Q. Did Mr. McElroy express any disagreement?

A. Mr. McElroy was not in favor of the Grand Jury probe from the beginning. And I don't remember what he said about prescription. I remember what Val said, I remember what Mr. Connick said, and that's what I know.

Q. Did Mr. McElroy say why he wasn't in favor of the Grand Jury or just he didn't like it?

A. I don't know. I just remember that he didn't like the idea.

Q. Before the Grand Jury testimony began, did you talk to as [p.950] many witnesses as you could, other than the ones McElroy told you not to talk to?

A. Well, let me say that I talked to all of the witnesses that I could find, anybody that was involved trying to run down and find out exactly what had happened to the shoe and to the pants leg, and that included a number of people.

Q. In the course of your investigation, before the Grand Jury proceedings began, before the hearings began, did you investigate the discovery requests that had been made by Mr. Thompson's lawyers in the armed robbery case and the response of the special prosecutor, Mr. Dubelier to that?

A. Yeah.

Q. Do you remember what you found?

A. Yes, sir.

Q. Tell us about that, tell the jury about it, please.

A. Well, when you're handling a criminal case, the defendant has a right to find out what evidence you have. The only way they can do that is if they file a pleading, a discovery pleading saying what do you have.

Q. You mean other than *Brady* evidence, right? I mean, *Brady* evidence has to be produced regardless?

A. Right. There are two ways that you can have an obligation as a DA to turn something over. First of all, under *Brady* and *Kyles*, you have a duty to turn over any evidence which is material either to guilt or to the punishment and --

[p.951] Q. The jury has heard quite a bit about that.

A. I'm sure. Then also, if there is something else that they specifically requested, you have to tell them truthfully whether you have it, whether you object to turning it over or not, you must answer the discovery truthfully. And so we went and looked to see did he ask about blood evidence. Did he ask about testing. And there was a discovery response, the discovery response was prepared by, I think it was Mr. Dubelier, and it was stamped, I believe it was prepared on -- I'm going to say --

Q. If I told you April the 2nd?

A. If you could tell me what the date of the Monday was. Tell me what the date of that Monday was.

Q. April 2nd was a Monday and April -- well, I'm sorry. I don't know back in 1985. The jury has heard evidence that the report was, the response was signed April 2nd and served and filed April 3rd of 1985.

A. I think, I think you would find that, I -- I could be wrong about the dates, but they, Eric Dubelier signs the discovery on, like, a Wednesday. It's filed on a Thursday, and on Friday, somebody from the crime lab is walking over there to check out just E-6 and E-7.

Q. The blood evidence?

A. Yes, sir.

Q. What did that mean to you? What was the significance of that, Mr. Glas?

[p.952] A. Well, he didn't, he didn't, in the answers, tell them that they had blood evidence, and he didn't tell them that he was going to request testing or that testing had been done or anything else. And so I immediately went and looked at the -- well, the Screening Action Form, which when you first get a case in, the screener who gets the case together, there is a Screening Action Form where he can put on notes suggesting to help the DA, so Bruce Whittaker was the screener. He writes, may want to get something, to the effect of you may want to get the blood evidence testing, which is always a good idea.

Q. Let me just ask you a question. If Mr. Dubelier had wanted to be straightforward in this when he served his discovery response, could he have written, have blood evidence, going to send for testing tomorrow?

A. Yes, sir, he could have. So they -- so the person from the crime lab goes out and picks it up on, picks it up on, like, I think that Thursday or Friday.

Q. The 4th? We heard about 10 o'clock a.m. on the morning of the 4th.

A. Okay. And then he sets it up to be tested on Monday. Now, it's my understanding, I interviewed Walter Strata about this specific test.

Q. Just remind us who Walter Strata is?

A. Walter Strata was the crime lab person who actually did the testing on the blood. So you've got this trial which is set to [p.953] go on Wednesday. That's right, on Wednesday. And on Monday, they are doing the blood testing. It takes one day. He's got the results

by Tuesday. He handwrites his conclusions on Tuesday. He puts it in a box, where things are typed in the order in which they are put there, in theory, he told me, and it's actually typed that same day.

Q. Is that faster than these things are usually done?

A. He described this as a rush job. Obviously, he's getting the results of the blood testing the day before this murder trial is set to begin.

Q. Do you conclude that maybe --

A. I'm sorry, armed robbery trial.

Q. That's quite all right. Did you conclude that maybe the crime lab actually requested the evidence and set up the testing at this time?

A. It's never been my experience that the crime lab suddenly three days before a trial without anyone calling them decided on their own to go through all their cases and find one in which they could do blood testing. If someone had ordered this, it was a rush job.

Q. The armed robbery was December 28th, 1984, so the evidence had been there over four months by then?

A. Right. Yes, sir.

Q. So what happened next?

A. So they do the blood testing on, I think it's that Tuesday. [p.954] Trial is set to begin on Wednesday, but they can't start the trial on Wednesday, I think, because you had the *Norris Vessel* murder trial which

was a judge trial in the same section of court. Which I think Bravo was in Section B. So it's in Section B, they've already got a trial going and that's, I believe it's Bruce Whittaker and Gerry Deegan who are trying the Norris Vessel case.

Q. That was a murder case?

A. And that was a murder case. It was a judge trial murder.

Q. I understand. They were trying another murder case, Deegan and Whittaker, in the two days right before Thompson's armed robbery trial started?

A. Yes, sir.

Q. Did that have any significance to you?

A. First of all, in each section you've got a senior and you've got a junior. At least one junior. Sometimes two juniors. Gerry Deegan was a junior in Section B. So the Norris Vessel trial was coming up and so is the armed robbery trial. Jim Williams is in charge of the armed robbery trial. Bruce Whittaker is in charge of the Norris Vessel murder trials. Two murder trials, they were going to piggyback them. One is going to end, the other one is going to start the same day which ends up being, I think, Thursday.

Q. So they weren't two murder trials, it was Thompson case and --

[p.955] A. Murder and armed robbery. I'm going to do that all day. So you've got, you've got a murder and an armed robbery trial being piggybacked. You've got the

same junior working on both cases, so you know this guy is running ragged. I don't know what he was doing on Monday. I think he was in trial on Tuesday, but it might have been that he was in trial Wednesday and Thursday. But in any event, he's in trial with Bruce Whittaker immediately before this case was set to go. So I believe, of course, that Jim Williams who is the senior, he's in charge of this case, this armed robbery case, that he's the one who is shepherding it, getting ready for trial.

Q. Before the hearings began, did you talk to Bruce Whittaker, after all the crime lab report was --

A. I was not -- I was not supposed to talk to any of the attorneys, any of the former Assistant District Attorneys.

Q. So you didn't talk to Mr. Whittaker at all?

A. I was in the room when they had Bruce Whittaker come in.

Q. Okay. In the Grand Jury?

A. Before that.

Q. Oh, okay.

A. I was there at the Grand Jury, too, but I can't talk about that.

Q. I was trying to distinguish because I promised you and the judge that I would not get into what happened in the Grand Jury room. Were you in a room where

Bruce Whittaker spoke to someone [p.956] at a time outside of the Grand Jury hearings?

A. Yes, sir.

Q. Tell us about that, what was discussed at that meeting?

A. Well, that's still that Friday. That's the day after that I got called up to get the things started. And on that Friday, one of the things we got was the answer to discovery, saw where it was stamped, saw what the answer was. And we saw the date that the crime lab guy had gone and gotten the bloody shoe and the bloody pant leg. So they had Bruce Whittaker come in and Tim McElroy, Val Solino, Mr. Connick, and I believe Lieutenant Danny Lawless, I believe he was there, too.

Q. We've heard reference to Danny Lawless. He was an investigator in the District Attorney's Office?

A. Yes, sir, he was a member of the New Orleans Police Department, he was assigned as investigator, I think the head investigator at the office. And so they brought Bruce Whittaker in and they started to ask him questions.

Q. What did they ask and what did Mr. Whittaker say?

A. I don't remember anything. Everything I can tell you, you know, that -- the most important thing was that he -- it's what he admitted and what he denied. You know, he admitted that he got the report, which he kind of had to do because his name was on it. He admitted he got the report and he admitted that he

brought the report to Jim Williams, and he admitted that he put it on Jim Williams' desk, but he denied knowing whether [p.957] Jim Williams actually got the report that showed that the perpetrator's blood type was B. And we asked him, you know, wait, you know, are you telling me -- well, did you talk to Jim Williams about the report?

Q. Let me just ask you for a moment. Mr. Whittaker and Mr. Williams worked right near each other, right? Maybe you don't know where their offices were. I'll withdraw that.

You knew that Mr. Whittaker testified in the Thompson armed robbery case by that point, right?

A. I don't want it to get confusing.

Q. Okay.

A. But one of the things that you can't over -- one of the things that stuck out to me is that, you know, you're an Assistant District Attorney in screening, here is what normally happens: You get a police report, here is a bad guy, this is what he did, you either accept it and you're going to reject it. I never worked in screening, but that's generally how it happened. In this case, it wasn't quite like that. The armed robbery, which I'm sure you've heard about, involved Mimi and Jay LaGarde and their brother, and during the struggle when Jay LaGarde crashes the car, the armed robber comes forward, he wheels around, if I'm remembering correctly, grabs for the gun, starts kicking bad guy in the face, bad guy bleeds on his shoe and on his pants leg. Okay? They don't catch the bad guy that night. They don't catch him ever. And then

one day in the [p.958] newspaper, there's a picture of John Thompson who has been arrested for the murder trial, and the LaGarde family, and I don't know, I can't say you who saw the picture first or what says, hey, could this guy who's been arrested --

MR. GOINS: Your Honor, I'm going to object to hearsay. He's now saying what the LaGardes said. It's an out-of-court utterance of some other person.

THE COURT: I'm going to overrule the objection. This was part of your -- you did this as part of your investigation into this?

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. Overrule the objection.

MR. BANKS: Mr. Glas.

THE WITNESS: And so it was my understanding that, you know, they are at home and I don't remember if it was Stewart LaGarde, the father, or it was Mimi LaGarde who saw it, but I do remember that Jay LaGarde was away at school in college. And so they look at the picture, could this be it. Mimi says, yeah, that could be him. I think they send it up to Jay LaGarde. He says, yeah, I think that could be him. And Bruce Whittaker does his own photo lineup. Now, normally a police officer does your photo lineup. And I'm not saying it's right or wrong. I'm just saying it's unusual. He puts together some pictures along with the same picture, I think, that was in the paper, goes to the LaGardes' house and says, tell me which of these guys did the [p.959] armed robbery. And Mimi LaGarde identifies the same picture, I think she saw

in the paper, of John Thompson. And he goes, good enough, and they charge him with the armed robbery. He'd already been arrested for the murder.

Q. What do you think of that identification and how that might hold up in trial?

A. It's a terrible identification. You know, you struggle over identifications where you've got a police officer who does a lineup on the card and you're looking to see if the background behind one of the faces is a little bit lighter than another one, is it suggestive, does it look like it's an earlier, an older picture. You can get pretty crazy with this. Here, you know, this is someone who saw the guy having been arrested for murder and is asked, could this be the guy.

Q. Well, let me ask you this: What's the significance of that to your investigation and review of the blood evidence issues?

A. Well, you know, there was a motion hearing. And, you know, they file a motion to throw out this identification because it's unreliable. And at that hearing as a District Attorney, it was always our job to go in and to call the police officer, show that everything was done by the book. They do this identification, they put Mimi LaGarde on the stand, as I recall. She explains what I just told you, and the judge, instead of saying, this happens a lot of times, your motion to throw it out, motion to suppress, it's denied. Instead the judge says I'm going to take [p.960] this under advisement. Which means I have to think about this. And at that point, you know, at that point, if I'm a prosecutor, I'm thinking my -- and it's an ID

only case at that point, my ID just went out the window, I've got nothing here.

Q. So what would that indicate to you about the blood evidence and the significance of the blood evidence?

A. That's all you've got.

Q. When Whittaker was speaking in this meeting and describing having left the report on Williams' desk, was he asked in that meeting, did you ever talk to Jim Williams? Did you find out, did you find out from Jim whether he saw the blood report? Did you find out whether the blood matched? Did you find out what they did with this blood report?

A. He was. And I had cases, not many, but I had some cases against Bruce Whittaker when I was a DA. I respect him, he's a good lawyer. But I will you that when he was in that room, that's when he got uncomfortable. He looked uncomfortable if I had to describe the way he was acting and everything else. But he starts -- this is what he's actually telling us. He's telling us, he's a witness in the John Thompson armed robbery case. He's going to be called to the stand to explain the photo lineup I just told you about. He personally walks the perpetrator's blood type over to Jim Williams' desk and puts it on, gets called, I believe, by Jim Williams, but in either event, called at trial, waits at trial, testifies at trial, and never says, hey, did the [p.961] blood evidence rush job that I personally delivered to your desk, did it match up with John Thompson's blood type? I find that incredible and I wasn't the only person. Lieutenant Danny Lawless who was in the room because he's NOPD officer and a good one, and when it was over, and I don't think I

said a word when Bruce Whittaker was in. I'm pretty sure I didn't say a word when he was in Tim McElroy's office. When they were done, they all turned to Lieutenant Lawless and said what do you think? And he said I think they're hiding something. I think he's hiding something. Everybody agreed and so now this is Friday, I've got from then until Thursday for the Grand Jury. The question is, what are we going to do, are we going to call him? We agreed that he would be called, and then, you know, at that point, Mr. Connick kind of, you know, took the cuffs off and said, go. Find out everything you can go find out about this before Thursday.

Q. And did you get back to Mr. Connick from time to time with your conclusions and findings?

A. Yes, sir.

Q. You kept him in the loop?

A. Yes, sir.

Q. Did you tell Mr. Connick that you spoke to Mimi and Jay LaGarde?

A. Yes, sir.

Q. What did you tell Mr. Connick about your discussions with [p.962] Mimi and Jay LaGarde?

A. Well, Mimi and Jay LaGarde, they remembered that when they showed up for the trial, obviously, you know, they remembered them taking the shoe and they remembered the police cutting Jay LaGarde's pants leg or seizing a whole pair of bloody pants, I

forget which one it was, but they remembered that, so when they show up at the trial, they say, hey, did the blood match John Thompson's? And Jay LaGarde specifically remembered being told by the person who did his direct examination that it was inconclusive.

Q. What does that mean?

A. That they couldn't tell what blood type the pants leg or the shoe was.

Q. But the crime lab report said it was Exhibit B?

A. Yes, sir.

Q. So that answer given by the District Attorney who put Mr. LaGarde on the stand would have been dishonest or inaccurate?

A. It would have been accurate as to the shoe. It would have been inaccurate as to the pants leg.

Q. Because no result could be obtained from the shoe, the result was obtained from the pant leg; right?

A. That's correct. And you can't miss it. It's on the report, B.

Q. Mr. Williams was the DA who put Mr. LaGarde on the stand in the armed robbery case, wasn't he?

[p.963] A. Yes, sir.

Q. Did you think this was just a rogue DA, Gerry Deegan, the young assistant who on his own without

knowledge of Whittaker or Williams or Dubelier or anyone else committed a bad act?

A. No, sir.

Q. Why not? Maybe that's a pretty broad question.

A. You know, I did, in fact, y'all showed me my deposition. I did a memo. When we -- all right. A couple things. You know, we did meet with Mr. Connick from time to time, and one of the times we met with him was the same morning of the first Grand Jury meeting. That morning we had Val said we had a command performance at Mr. Connick's house, so for the first time that I had been at the DA's office, I get to go to Mr. Connick's house for breakfast that morning to meet and talk about what was going to happen in front of the Grand Jury.

Q. May 6th, 1999?

A. Yes, sir, I believe that's correct.

Q. Go ahead.

A. So that was one of the times that we sat down with him. I showed up at the house. There are a number of people there.

Q. Did Mr. Connick ever tell you that it was presumptuous or inappropriate on your part to speak to him directly or send him memos or share your facts or conclusions with him?

A. No, sir, no. In fact, that morning, we're getting together so that Val and I can tell him what we had found.

[p.964] Q. On the morning of May 6th at Mr. Connick's house, you said you had breakfast?

A. Yes, sir. Well, we had orange juice and donuts.

Q. Over orange juice and donuts, did you tell Mr. Connick that it was your intention to ask every question that had to be asked in front of that Grand Jury and to find out everything that you could find out?

A. Yes, I did. Yes, sir.

Q. Was that your intention?

A. Yes, sir.

Q. Now, without telling us what you asked and what witnesses said, did you do that at the hearing on May 6th?

A. Yes, sir.

Q. Did you start as to those witnesses by asking everything you could to find out the truth and as many facts as you could get?

A. Yes, sir. Mr. Connick and Mr. McElroy were there for Bruce Whittaker. Then they left, and I handled the next, I think it's five or six witnesses in front of the Grand Jury, about another six or seven hours that we were -- maybe not, five or six hours that we were there.

Q. Do you recall between -- well, let me just ask you, the Grand Jury, this first day was on May 6th, and they were scheduled to meet again on May 13th, a week later to hear more witnesses?

A. The Grand Jury meets every Thursday. The question became [p.965] whether there would be more evidence presented at the next Grand Jury session.

Q. When the session finished on May 6th, did you expect to be presenting more witnesses on May the 13th?

A. Yes, sir.

Q. Were there witnesses you had identified who had not yet testified?

A. Yes, sir.

Q. Do you recall sending a memo to Mr. Connick between May 6th and May 13th outlining the conclusions, the facts that you had come to?

A. I am sure I did.

Q. Let's go to Exhibit 118. Can you put that up on the screen? And it's also, if it would easier for you, sir, if you look at the book you have there, there is probably a black binder on your left, but you can look on the screen, either way, that says Connick on it. Under McElroy. Well, maybe not. The very bottom binder is the one that says Connick. I think Tab 118 there is the same. Let's look at this Exhibit 118. This is a memo that you wrote to Harry Connick on May the 10th?

A. Yes, sir.

Q. He didn't get back to you after he got this and say this was presumptuous or criticize you in any way for sending it?

A. No, sir.

Q. Let's go, Mr. Vincent, to the substance, maybe you could [p.966] take a portion of it and blow it up. I'm not going to ask you about every paragraph, but you were outlining for Mr. Connick the facts that you had reached, the conclusions you had reached based on the investigation you had done as of this date which was between day one and day two of Grand Jury hearings; is that right?

A. Yes, sir.

Q. Just go through a few of these. Dubelier, Number 7, Dubelier wanted the armed robbery tried before the Liuzza murder trial. You knew that from talking to witnesses?

A. I knew that from talking to Val Solino. And that made sense to me because you want to get the armed robbery conviction before you go to the penalty phase of the murder.

Q. Number 8, Williams knew about the bloody pant and shoe. There was no doubt in your mind that Mr. Williams knew about there was blood evidence, was there?

A. No doubt.

Q. We talked about Number 9, Williams making a request in open court that the blood be tested and you talked about Number 10; right? This is the answer to the discovery motion when Dubelier said inspection to be permitted? Right?

A. Yes, sir.

Q. Not we have blood evidence, we're sending it out for testing, inspection to be permitted?

A. That's correct, sir.

[p.967] Q. Will you go to the next section, please. Just to go through the sequence to make sure this refreshes your recollection. April 3rd, Dubelier's answers were filed in court. On April 4th, the blood evidence was picked up to be tested. Right? That's 12?

A. Yes, sir.

Q. Number 13, the testing of the bloody pants/shoe was expedited by someone. Why were you telling Mr. Connick that someone was rushing this? What was the significance of that?

A. Well, it had significance for, to me that significance is for two reasons. One is that this is not something that the screener requested, you know, as soon as he got the case he requested it and it goes off and it's going to come back and go to whoever is handling the case in trials. It wasn't something that they had requested months before. Somebody obviously after that, that motion hearing realized that this was going to be a tough ID case, and somebody was trying to get it done before the trial began, and that's why, you

know, somebody was walking over to pick it up the Friday before trial.

Q. Number 18, Williams called the shots at trial?

A. Yes, sir, he was the senior and it was his case.

Q. Go down to the bottom. I had asked you before if you remembered who at the armed robbery hearing actually introduced into evidence those pieces of evidence that the DA wanted to introduce, and you didn't remember on the stand, which is fine, [p.968] but let's just look at Paragraph 21. Williams introduces five of the seven pieces of evidence from the NOPD crime lab. He does not introduce the bloody pants and shoe. Does this refresh your recollection that it was Williams who put 5/7ths of the evidence in, but nothing about the blood?

A. I don't remember, but, yes, if I put that there, that's correct.

Q. You wouldn't have written it had you not seen it in the file?

A. Yes.

Q. I wanted to blow that up. Numa Bertel. He was Mr. Thompson's lawyer in the armed robbery case?

A. Yes, sir.

Q. And you advised Mr. Connick that Bertel was never told by Whittaker about the bloody pants/shoe or given the crime lab report, right?

A. Yes, sir.

Q. Now, 23 and 24, actually, 23, 24 and 25, the jury has seen them, but I'll just summarize. Williams writes a trial report saying there is no corroboration for the identification. Let's start with that. Was that Mr. Williams saying that these are weak identifications, this could be a difficult conviction to get?

MR. GOINS: I object. Your Honor, pure speculation as to what --

[p.969] MR. BANKS: I'll withdraw that, Your Honor.

EXAMINATION

BY MR. BANKS:

Q. What did you mean by that when you wrote Number 23?

A. No corroboration to me means no support for it. You've got, you've got an identification case only. They say this is the person who robbed him. Nothing puts him at the scene or links him to the crime.

Q. So what bearing did that have on your investigation and what you were saying to Mr. Connick?

A. Well, it has to kind of be taken with the next one. The crime lab report is not in the DA file. I went and saw John Rohr (phonetic), who was our guy in charge of all of the files because obviously, one of my questions was, was the report, which obviously didn't

go into the courtroom, is it in the file. So I had him make a copy of the entire thing, seal it, then let me see the original. I go through and look, and it's not there. So the last we have is Bruce Whittaker saying that he put it on Jim Williams' desk. It does not go to the defense, it doesn't go in a trial, and it doesn't go into the DA file.

Q. And Mr. Williams closed the file signing the inside front cover. What was the significance of that?

A. He closed the file out. He's supposed to go through and make sure everything is in there before he closes the file out and even on your jury trial report. Now, your jury trial report, [p.970] you type up, you tell them what happened at trial, and you submit this, I think you saw, this is not the jury trial report, this is something else that Tim would give us the stars on if we won, but the jury trial report, he puts no corroboration for the ID. And that's, that is what it is.

Q. The last point, Williams tells Whittaker that he remembers Deegan starting to say something about blood evidence, but he told him, whoa, indicating that he did not want to know.

A. That is what Whittaker said.

Q. We can pull that down, thanks.

The next session after May 6th was scheduled for May 13th. You said a Thursday.

A. I'm sorry, can you repeat that question?

Q. The next Grand Jury session, the next time they would hear evidence in this investigation was on May 13th?

A. Yes, sir.

Q. To your knowledge, did the Grand Jury hear testimony from witnesses that day?

A. They did not, sir.

Q. Why not? What happened?

A. Well, you know, the morning that we went to Mr. Connick's house, it was 180 degrees. I mean, he completely changed. We were at his house. We tell him there is a new person there. There are some new people there or a person, I don't know. But anyway, there is a reason for us to go through all of the [p.971] evidence again. We put it all out there. I'm convinced, I think Val is convinced that this is, that this was done, that both Gerry Deegan, Jim Williams and possibly Bruce Whittaker had gotten the report and had scuttled it because either they knew it didn't match, didn't want to take the chance, in either event, they scuttled the report. At that point they completely disagree with us. Mr. Connick disagrees, I don't know. I don't think so, there is not enough evidence. Absolutely not. That was, we still went forward that day with the Grand Jury, but I believe it was the next day or a couple days after that, I don't know when it was, there was another meeting and it was absolutely clear that Mr. Connick did not think that there was enough evidence or did not want to go forward, but it was completely different than our first meeting when we showed him the smoking gun. And at that point

that they started talking about the, you know, Gerry Deegan, the rogue junior DA in Section B, while he's in trial with Bruce Whittaker masterminds the hiding of this blood evidence.

Q. So you thought the rogue DA theory was ridiculous?

A. I thought it was ridiculous.

Q. May 12th, the night before the Grand Jury was to convene again, do you recall a meeting in Mr. Connick's office?

A. Yes, sir.

Q. Who was there?

A. The night before the second Grand Jury meeting was me, Val [p.972] Solino, it was Tim McElroy, Mr. Connick, the chief of screening, I think at the time, Richard Olivier, and I think it's a Mr. Wessell.

Q. What happened at that meeting?

A. Well, I went to the meeting with a list of the exhibits that I wanted to show the Grand Jury, a list of witnesses that I intended to call the next day, and also I went to them with two typed indictments.

Q. And let me just stop you for one second. You already had witnesses subpoenaed and scheduled to be there the next day?

A. I don't know if they were subpoenaed or if they were just scheduled.

Q. Okay. Go ahead. So you had indictments typed up?

A. Yes, sir.

Q. Tell us about that. Indictments against whom saying what?

A. I typed up too indictments, one -- well, both of then against Bruce Whittaker and Jim Williams. Gerry Deegan was deceased. So Jim Williams and Bruce Whittaker for obstruction of justice and malfeasance in office.

Q. You didn't have anything typed up against Dubelier, had you reached a conclusion yet one way or the other as to whether Mr. Dubelier had done anything wrong?

A. No, sir. And, you know --

Q. Were you prepared to say he hadn't done anything wrong?

A. No. I could not, I could not say that it ended with [p.973] Jim Williams, especially since Dubelier answered the discovery and Dubelier was the lead on the murder trial. Well, we're one week into the investigation. I mean, it's, you know, there are still a lot of people we need to talk to and a lot of things we need to look at.

Q. Sometimes indictments or further proceedings lead to additional information and additional targets or charges; right?

A. And sometimes you charge people and they come forward and they tell you everything.

Q. So anyway, here we are, it's the night before day two?

A. Yes, sir.

Q. Was day two, were you expecting day two to be the final day of testimony or did you know?

A. I didn't know. But, you know, I can't go into what happened at the first Grand Jury meeting. There were witnesses, I can tell you, I can tell you that, you know, obviously anyone would be concerned about the DA's Office investigating itself, its own people while, you know, I mean, Mr. McElroy was Assistant District Attorney at the same time as Mr. Williams and Mr. Dubelier and Mr. Connick was in office at the same time. They had, you know, concerns and I gave them my word, I will show you everything I find, and I'll call every witness you want me to call and I'll show you every piece of evidence that you ask for.

Q. You gave your word to whom?

A. To the Grand Jurors.

[p.974] Q. So let's go back to this meeting on May the 12th, the night before what was supposed to be day two. Tell us what happened at that meeting.

A. So we went up to the office to tell Mr. Connick where we were.

Q. Who is "we"? You and Mr. Solino went up?

A. Yes, sir.

Q. And you told him you were going to present the Grand Jury with indictments?

A. That was our recommendation, yes, sir.

Q. And what was Mr. Connick's response?

A. No. Not enough evidence. This is all circumstantial evidence.

Q. Did you or Mr. Solino respond to that?

A. Mr. Solino is a much better diplomat. However you want to say it, diplomacy or politician than I was. And Val who is, has a tremendous amount of respect for Mr. Connick and likes Mr. Connick very much, I think he very, very delicately said, you know, Mr. Connick, we convict people of murder all the time on circumstantial evidence. Why wouldn't we charge District Attorneys, former District Attorneys, with obstruction of justice and malfeasance in office based on circumstantial evidence. All you have to do is exclude every reasonable hypothesis of innocence. That's the test for circumstantial evidence and here we believed that we could exclude every reasonable hypothesis of [p.975] innocence. We had them signing and checking out the evidence itself, we had a confession from one of the people involved, we had, we had all of the evidence, and Mr. Connick was adamant. Absolutely not. There is not enough evidence. And then everyone in the room started to talk about that.

Q. Well, what did people in the room say?

A. Well --

Q. Did you as the less diplomatic one of the pair say anything?

A. I was -- I was adamant that there was enough evidence to convict. And I was concerned at the time, I was concerned about a number of things, but I offered to try the case myself. And we had done a murder trial, I had done a first-degree murder trial that month. I had done one two months before. And, you know, I didn't, I was convinced that a jury would convict him of the evidence and I thought that we should leave it up to the Grand Jurors to decide whether to indict or not. And as we went around the room, different people said I believe that there is enough for this charge or that charge and when it became clear in the room that there was enough evidence to convict, then Mr. Connick said something else.

Q. Well, he changed his position?

A. Well, he didn't change his position.

Q. Tell us what he did.

A. Well, I don't care if there is enough evidence, it's prescribed.

[p.976] Q. Meaning the charges are based on something that happened too long ago?

A. That's what Mr. Connick said. He said, it's prescribed, it's been too long. And that's when, I'm less diplomatic. I said wait, we've talked about this. What

Supreme Court Justice is going to say if you hide it for six years, you're off the hook. If you only hide it for five years, you can charge him. If you can keep it hidden for six years, we can't charge with you the crime.

Q. Let me understand this, Mr. Glas. You had told Mr. Connick before the Grand Jury even started that you had done research and analysis and you concluded the charges would not be prescribed and he, after hearing your explanation, said, I agree?

A. He was satisfied with that, yes. The first meeting when we showed him the smoking gun, he was, you know, you're right, we have a good-faith basis for doing the Grand Jury probe, let's do it. And now here we are, it's the moment of, you know, are we given the indictment or we don't and he's saying it's prescribed. And I'm looking at Val because Val and I are the only two people I know in the room who looked at the issue of prescription and we're both saying the same thing which is why are you saying that, Mr. Connick. We have not seen anything that says that.

Q. So Mr. Solino, he's already testified about this in this Court, but Mr. Solino agreed with you on May the 12th that the charges would not be prescribed if there was a good argument to [p.977] make?

A. That there was a good argument to make. Prescription is an affirmative defense, so if you charge somebody with -- I mean, if you charge somebody with a crime, they have to raise the issue of prescription and say, well, whether or not I'm guilty of that crime, it's been too long, it's prescribed. And then a judge decides whether it is and then that judge's ruling can be reviewed by the Fourth Circuit and by the Supreme

Court. So my point to Mr. Connick was, even if you believe that, and I don't know why you believe that, but even if you believe that, I really don't think that's our decision to make. I think that, let them raise that argument, let a judge rule on it, let a judge tell us it's been too long and let the Fourth Court of Appeal tell us the judge is right and let the Supreme Court tell us that the Fourth Circuit is right.

Q. Did Mr. Connick explain to you what, if anything, caused him to reverse 180 degrees from the week before when he had agreed with you about prescription?

A. No, sir.

Q. So what happened after you and Mr. Solino pointed that out to Mr. Connick?

A. Well, he decided that he was, we were going to end the Grand Jury.

Q. Did you comment on that about ending the Grand Jury, either seeking indictments or continuing testimony or anything else?

[p.978] A. Mr. Connick is the District Attorney. It's within his discretion to prosecute or not prosecute anybody. It's within his discretion and I don't question that. My problem was that I had given him my word, so what I said was, I will go in, I'll call the witnesses, I'll show them the evidence, I will pack my things up, I will walk out and then you can go in and you can tell him anything that you want. That's exactly what I told him.

Q. About indictment or not?

A. Yeah, you go in and tell him it's prescribed. You go in and tell them whatever you want, you're the District Attorney, it's within your discretion to do that, but I gave him my word, I want to show them everything, I want to show them the additional exhibits, I want to hear from the additional witnesses.

Q. You wanted to get the facts, right?

A. I wanted to keep my word. And I also, you know, the Grand Jury can indict against the recommendation of a District Attorney. I thought we should leave it up to them, but if Mr. Connick was going to say he was not going to allow them to return a bill, either a no true bill or a true bill or whatever, that's up to him. I work for him, but I wanted to show them everything before he went in and told them that.

Q. So what did Mr. Connick say after you told him they should at least get to hear the facts of the witnesses?

A. You're not showing them another piece of paper. And I said why. And he said, because that will make my job more difficult.

[p.979] Q. Make his job more difficult?

A. And I said, then your job is more difficult. And that was the first time I've ever talked back to him. That's the first time that, not that I had a lot of dealings with Mr. Connick when I was trying the cases, but I mean

Q. Did you feel that what he was doing was wrong?

A. It's not for me to say. It's not for me to say. You know --

Q. That's fine. So what did you do?

A. Plus I'm 29 years old. I'm 29 years old, this is all I've ever wanted to do. It's my career. I'm good at it. Maybe the first thing I'm really good at in my entire life and I'm good at it. I'm good with the victims, I'm good with the witnesses, and I was good as a trial lawyer. And all I wanted to do was work at the DA's Office. I mean, you're living on nothing. You're not doing it for the money or for anything else.

Q. But you liked it?

A. You love the work. And that's where I wanted to be. And at that moment, I got two choices, you know, I go down to my little cube or I say something and for whatever reason I watched that movie *Searching For Bobby Fischer*, you know, within a week of that day, and, you know, the mother, the mother that was -- the instructor doesn't want the kid to play chess at the park because it hurts his teaching and he says it makes my job harder and the mother said then your job is harder. So Mr. Connick says, you're [p.980] not showing them another piece of paper because it will make my job harder and I say then your job is harder. And at that point he says why are you being a pain in my butt? I'm not sure he said -- why are you being a pain in my butt and I said, you know, think about what you are to doing. You're asking me not to show the Grand Jurors evidence in a case in which they are doing a probe into whether DAs hid evidence. You

know, I'm trying to protect you. This was a chance for this office, which as long as I was there, you know, I took pride in the cases that we handled. And I turned over plenty of evidence that was not exculpatory, that was going to make my life miserable just because it was the right thing to do. We tried the cases clean. You either won or you lost the case. It's --

Q. You were an ethical prosecutor?

A. Well, I did what I thought was right. And this was a chance for us to say we have caught guys who did not do it right. And we do not tolerate this and we will get to the bottom of it and we will indict our own. And you remember that hearing, the first hearing we had about this about whether the evidence had been destroyed by the court property room. I handled that hearing. I called Mr. Spears to the stand, and I asked him every question you could ask and at the end of that hearing, I said, "I tender the witness" and you said, "I have no questions." And that's the way we should have handled it. We should have indicted these guys, but they didn't and it was wrong.

[p.981] Q. Let's just go back. After you told Mr. Connick the line from the movie his job just got harder, what happened?

A. Well, it was over. I mean, we're walking out of the room, and you can tell right now, what are we, eight years later, I don't even do criminal law anymore. And I still, I'm still starting to talk loudly about it and to get worked up about it. You can tell. We were already starting to raise our voices. Why are you being a pain in my butt? I'm trying to protect you, I tell him. And as we're walking out into this little foyer outside of his

office and there's a secretary there and there are other people there and they hear us and we're talking loudly to each other, and I said, we were walking into the largest room in the DA's Office because Mr. Connick was about to give a lecture to all the DAs on your duty to turn things over. So I turned to him and I said, just let me go in and show them everything. No, you're not showing them everything. We do the whole thing.

Q. You mean to the Grand Jury?

A. What's that?

Q. The Grand Jury, not the meeting? You were trying to tell him to let you go in to the Grand Jury?

A. Let me go tomorrow morning to the Grand Jury, I'll put on all of the stuff that we found and then you go in and tell them what you want. He says no, and I say then I want off the case. He goes, fine, you're off the case. So I turn around, I walk into the room, I sit down, my face is probably red as, you know, [p.982] a cape and I'm sitting down there, and Mr. Connick walks in, 80 DAs in the room and proceeds to give an lecture on your duty to turn things over.

Q. What happened when the meeting ended?

A. I went downstairs. Now, you got to remember, my -- this is, what, June of 1999, okay.

Q. Yes, sir.

A. Okay. So 29 years old, I'm married, my wife just graduated from law school, you know, not only do I have never typed a resumé for anyplace else, but I

don't have any leads or anything else like that. The only place I ever wanted to work. I go downstairs, I type my resignation letter and I packed everything in my office and I put it in my car.

Q. Why?

A. Because I'm going to give him one more chance the next morning to let me do it and then if they say no, then I'm going to resign. And I knew exactly what was going to happen. So I went home, talked to my parents, you know, here is the situation, I am not going to go -- it's wrong. So the next morning I went in, went up to the Tim McElroy's office and I sat in there in the same little foyer with Ms. Zulli (phonetic) and everybody else. You know, everybody remembered the night before. I went into Mr. McElroy's office and I said, Tim, just let me show them what we have, and then you-all can tell them whatever you want. He said no, that's not going to happen. I handed him my resignation [p.983] letter, and at that point, I said, look, you know -- at that point, in appeals I had, I was handling a lot of cases, a pretty big docket and I was also special in several kind of high-profile murders and several rapes.

Q. Special prosecutor?

A. Yeah. I mean, I had one where the son killed his mother.

Q. We don't need those details?

A. So I had these cases and it's a lot of information, a lot of work on these cases and I said I will go down to my office in the next two weeks, I will sit down and I

will type up memos and everything else about them, I'll ease the transition to whoever is going to replace me and I tell you I won't say a thing about the case, I'll just sit down there. I went down to my office. Val was waiting. He saw that my office had been cleared out, he was, he knew what that meant. And as I'm walking down the stairs, Val is being paged and by the time I get downstairs a few minutes later, Val comes down and says they want you out of the building. So here I've been for the last probably two years or more, I've done close to a hundred trials, you know, it's my life, it's everything, and I'm going to be escorted out of the building.

Q. So your career goal is over?

A. That's it. You're not going to do criminal law. You're not going to be a prosecutor anymore. So tomorrow morning, I'll type up a resumé and I'll apply to local law firms and that was it. [p.984] Fifteen minutes after I resigned, they entered the Grand Jury probe.

Q. So did you ever get to fulfill the promise you made to the Grand Jurors to show them everything?

A. I did not.

MR. BANKS: Mr. Glas, thanks very much. I have no questions. Counsel for the defendants may have a few for you.

THE COURT: Mr. Goins?

MR. GOINS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. GOINS:

Q. Mr. Glas, does blood evidence degrade over time?

A. I do not know.

Q. You didn't find it out from Mr. Cusimano?

A. Excuse me.

Q. Did you try to find that out? When you were conducting your investigation, did you try to determine why the test on the tennis shoes was inclusive and why the other test was reliable?

A. I don't think I did.

Q. You didn't try to do that?

A. I don't think so. I don't remember, but I don't --

Q. Did you try to do any research to determine whether or not it was reasonable to expect, given the fact that the test had not been done for, what, four months, they got, they got the blood evidence in December, but they didn't do the test until, what was

* * *

[p.986] call. This is a piece of paper with the perpetrator's blood type on it. Whether or not this test is accurate, I think that's an interesting question and I'm sure either side would raise it no matter what the result in a trial, but you have a duty to turn this over

and the DAs took it and they threw it away. And that's, that was my concern.

Q. And didn't Harry Connick agree with you that they had a duty to turn it over?

A. No, sir, he did not.

Q. Well, why did he then ask for a new trial? Why did he then ask for a stay of the execution?

A. First of all, when we said, you know, when we were in that room the night before at the second Grand Jury meeting the night that I said I want off the case, the night that we had the argument, when I said that we have proof that this went, I believe we can prove this was -- that Jim Williams knew about this, Mr. Connick and Mr. McElroy started to argue with us as to whether or not you have a duty to turn over, whether you have a duty to turn over that report. And Mr. Connick's point that he tried to make or to persuade me about was that if you don't intend to use that piece of paper and you don't actually know what John Thompson's blood type is, then you don't have a duty to turn it over. And Mr. McElroy agreed. And I did not. Val Solino did not and to my recollection, I don't remember anybody else in the room necessarily agreeing with that. I mean, [p.987] otherwise you're the DA, hey, I got a piece of paper that's got the perpetrator's blood type on it, I'm not going to use that, so I'm just -- and I don't know what his is, I'm just going to go ahead and put it over there.

Q. Did Mr. Connick file a motion for a new trial and set aside the conviction of Mr. Thompson?

A. Yes, sir. After all this, yes, sir, he did.

Q. Because, because you convinced him; is that right?

A. No, sir, because he had a test that showed that Mr. Thompson's blood type did not match the perpetrator's.

Q. So he agreed with you that it should have been turned over?

A. No, sir. That night he did not agree with me that they had a duty to turn it over.

Q. Why did he file the motion?

A. Because the motion has to do with guilt or innocence. What we're talking about has to do with *Brady* and *Kyles*. I'm talking about whether or not you turn it over. You're talking about whether or not you, you know, continue to prosecute somebody when there is scientific evidence that he's not guilty. Mr. Connick disagreed that we had a duty to turn it over, but he agreed now that we have it and now that we know, now we should dismiss the charges and they did. I mean, the Thursday that I got called up there, once we had this piece of paper that they scuttled, once we had it, and we knew, or we suspected, I doubt it, but we suspected, at that point we stayed the execution. I say "we," I [p.988] think Val went over and filed a motion to stay the execution until we could get to the bottom of it.

I do not, look, I do not question in any respect whether or not Mr. Connick did the right thing by dismissing the charges. He did. You were talking about scientific evidence, but we had evidence that he

didn't commit the crime. Mr. Connick did the right thing by dismissing it.

Q. He also did the right thing by not retrying it?

A. Yes, sir.

Q. Now, you were very proud of being an Assistant District Attorney?

A. Yes, sir.

Q. And you were very proud because you had been well trained and you understood *Brady* and you turned everything over that you should turn over?

A. That's not why I was proud of being an Assistant District Attorney.

Q. But you did do that, didn't you?

A. Did I do that?

Q. You had been well trained and you did turn the evidence over that had to be turned over?

A. Yes, sir, I did do that.

Q. And to the best of your recollection, the other people in the office did the exact same thing?

A. I did not know of anybody throwing away exculpatory evidence [p.989] while I was at the DA's Office.

Q. And it offended you that the rest of the world was casting aspersions upon Harry Connick's office because you knew that what they were saying was not the truth; isn't that true?

A. Yes, sir, I think we're paying for the sins of the former DAs.

Q. And it was being done right when you were there?

A. When I was there, I was doing it right. I think other people were.

Q. And everybody else in the office was doing it right?

A. I can't say that. I don't know of anybody doing it wrong, but, you know.

Q. And you were well trained; is that correct?

A. I don't know what you mean by trained. I got on-the-job training.

Q. You were asked that question in your deposition; weren't you?

A. Yes, sir.

Q. And what was the answer that you gave in your deposition with regard to the training?

A. Well, we received a lot of on-the-job training. Certainly when I was a law clerk, I was lucky enough to be with some outstanding Assistant District Attorneys. There were guys, I won't go through all of their names, but I clerked in a section that had a good

DA. I saw how he did it. He did it right. He [p.990] was a good DA. Then when I was a junior, I got put with a good Assistant District Attorney who he did it right and I learned a lot from him. But when it came to -- and we had -- we did have, we have to do a certain number of CLE hours every year, so the DA's Office so that we don't have to go pay for them, they would put on CLE seminars from time to time so we could fulfill those things. But, you know, in your section, you kind of ran your section.

Q. And you wanted to prove to the world that what was being said about the office was not accurate?

A. I think that was part of it, yes, sir.

Q. You were on a mission; is that correct?

A. I don't know if I would call it a "mission".

Q. It was important to you?

A. Yes, sir.

Q. And you really put your heart and soul into it?

A. Yes, sir.

Q. And it deflated you, it just crushed you when this process came to an end?

A. Yes, sir. It did.

Q. And it destroyed you that the career that you dreamed about slipped from your grasp?

A. It was upsetting that I had to leave the DA's Office, yes, sir. I did not want to go. I wanted to stay there.

MR. GOINS: I have no further questions.

[p.991] THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. BANKS:

Q. In your investigation, you didn't try to look at what training was provided to Assistant District Attorneys in the early and mid 1980s, did you?

A. No, sir, there was no time.

Q. Did you have any knowledge about what kind of training was provided back then?

A. No, sir.

MR. BANKS: Nothing further, Your Honor, thank you.

THE WITNESS: Thank you, Mr. Glas.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[caption omitted in printing]

FRIDAY, FEBRUARY 9, 2007, 8:30 A.M.
VOLUME V
TRANSCRIPT OF TRIAL PROCEEDINGS
HEARD BEFORE THE
HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

* * *

[p.1111] THE COURT: It's now about 2:00 and we have question number 1 from the jury, which reads, "What does deliberate indifference mean? Does it mean intentional or would failure to monitor be considered deliberate?"

Do you want to weigh in on this?

MR. COONEY: Your Honor, we would think that obviously that the Court has given, excuse me, instructions on this point, if the Court were to be inclined to do anything other than sort of reread the instruction on deliberate indifference, we thought that what the Court could consider doing would be to say that deliberate indifference does not require intentional misconduct, and then to pick up the thoughts that you have in your charge already that says deliberate indifference is established if there is a failure to adequately train, monitor and supervise and that you find Mr. Thompson has proved each of the following things by a preponderance of the evidence, and then there are the three things that you listed.

I think what they are grappling with is do they have to find intentional misconduct, and I think it's appropriate for the Court to say they don't need to find that. And I think to direct them to the three things that Your Honor's instruction says they should consider in determining whether or not there is deliberate indifference would be an appropriate way to proceed.

MR. AARON: Your Honor, from the question, I think they are confused as to the difference between intent and negligence. [p.1112] Because, you know, a failure to monitor would be negligence as opposed to intentional.

THE COURT: Failure to monitor, I mean, that could be intentional. It could be --

MR. AARON: But I think, looking at the terms that they use, I think the, in your charge you say that it can't just be simple negligence or whatever. So I think they are grappling with it's something more than just negligence and that's what it is, so it could be intent, it could be reckless disregard or just not caring, but it's something higher than negligence.

THE COURT: We all agree with that. It's a higher standard than negligence but something somewhat less than intent, wherever that falls.

MR. AARON: And so I think then to follow up, then, so if there's a failure to monitor, then it must be a higher standard failure of just, you see what I'm saying? I don't know if I'm making sense.

THE COURT: No, I think I understand what you're saying.

MR. COONEY: I think the Court's instruction really, the three things that you identified, Your Honor, on pages 26 and 27 of your charge are really the things that give the most significant guidance to the jury. I think that what's important is that the jury understand that they don't have to find intentional misconduct on the part of the policymaker in this instance in order to do that. And then I think the first and the [p.1113] second and the third points really lay out the factors that the jury can take into account.

THE COURT: Go ahead.

MR. AARONS: I was speaking with Mr. Connick. I still think the trouble they are having is what level of failure, okay. I think that's why they are saying, do they have to prove intent or could it be something less than intent.

THE COURT: Go ahead.

MR. AARON: So I thought your jury charge hit it, the way you told them. It's, okay, this is what you said, you said, "Deliberate indifference requires --"

THE COURT: Where are you reading from?

MR. AARON: Page 26, Judge.

"Deliberate indifference requires a showing of more than negligence or even gross negligence for a liability to attach because of a failure to train, the fault must

be in the training program itself, not in a particular prosecutor."

Anyway, then you go into it. And I guess maybe they are getting confused because remember that thing said train, monitor or supervise, and so they are focusing on monitoring and they are saying, Well, maybe he wasn't watching them carefully enough. But I think it has to be more than just not watching them carefully. It has to be, you know, if not completely intentional, I think it should be either intentional or reckless disregard, he just didn't care about it. Yeah.

[p.1114] THE COURT: Yes. That's the definition of indifference, you're indifferent to it, you're disinterested in it. So that's the definition, I think, of indifference.

Well, maybe what I could do is tell them that it does not necessarily mean intentional but it requires more than mere negligence or even gross negligence like I say here and then tell them to refer to these criteria that are set forth.

MR. AARON: Mr. Connick suggested to me that he thinks the word deliberate means intentional.

THE COURT: It doesn't, though. Not according to the law. I think that's pretty clear. It's something less than intentional. It's something more than negligence. That's what the law says. Yes. And I think it's fair, since the jury has asked this precise question, does it mean intentional, I should tell them, I mean, the honest answer to that and correct answer is, I believe, no, not necessarily.

But on the other hand, just the simple failure to monitor isn't enough itself either, if it's through the negligence. So that's what I'm grappling with here. I'm inclined to say something along these lines: While deliberate indifference does not necessarily mean intentional, it does require a showing of more than mere negligence or even gross negligence. And then tell them, please refer to the criteria for deliberate indifference on page 26 and 27.

MR. AARON: Now, as to the indifference part, can we say [p.1115] something that it's not caring? Which is what indifference means because I don't think anywhere in there does it really say that it's not caring.

THE COURT: It tells them what they have to find. It tells them they have to find these three things.

MR. COONEY: I think that's where the guidance really comes, Your Honor. I think the approach that you're outlining is appropriate because I think the thing that's most meaningful to them is going to be found in those three criteria.

MR. AARON: I think they are having problems with what the words deliberate and indifference mean. The words themselves. They are having problems, what does that mean?

THE COURT: Here is what I'm going to tell them. I'm sending this in. Well, let me read it first for the record. I've told them, "Deliberate indifference does not necessarily mean intentional but does require more than mere negligence or even gross negligence. Please

refer to pages 26 and 27 of the legal instructions referred to for guidance."

Send that in. It's now 2:10 p.m. All right. Eileen.

(WHEREUPON, at 2:13 p.m. the Court was in recess for jury deliberations.)

THE DEPUTY: All rise.

(WHEREUPON, at 2:40 p.m. the jury panel enters the courtroom.)

THE COURT: Okay. Ladies and gentlemen, please be [p.1116] seated. Let's see. I'm guessing that, Ms. Dennis, you've been selected foreperson since you're holding the envelope in your hand?

MS. DENNIS: Yes.

THE COURT: Before you hand that up, let me just ask you, has the jury reached a verdict?

MS. DENNIS: Yes.

THE COURT: And is the verdict unanimous in all respects?

MS. DENNIS: Yes.

THE COURT: All right. Please hand the envelope to my case manager.

All right. I'm going to ask my case manager, Ms. Stensrud, would you read the verdict.

THE DEPUTY CLERK: Number 1, was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by an official policy of the district attorney? No.

Number 2, was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the district attorney's failure through deliberate indifference to establish policies and procedures to protect one accused of a crime from these constitutional violations? Yes.

Number 3, please state what sum of money, if any, would [p.1117] reasonably and fairly compensate John Thompson for damages he has actually suffered or is reasonably likely to suffer in the future as a result of the district attorney's policy or deliberate indifference. $14 million.

Signed at New Orleans, Louisiana, this 9th day of February, 2007. Wendy M. Dennis, foreperson.

Ladies and gentlemen of the jury, is this your verdict?

THE JURORS: Yes.

THE COURT: Does anybody wish to poll the jury?

MR. AARON: Yes, Your Honor.

THE COURT: All right. Ladies and gentlemen, when your name is called by Ms. Stensrud, if you are in agreement with the verdict as it was just read in

open court, please answer yes or in the affirmative, or if you disagree in any respect, please answer no.

THE DEPUTY CLERK: Lisa M. Collette, is this your verdict?

THE COURT: You don't have to stand when you respond.

MS. COLLETTE: Yes.

THE DEPUTY CLERK: Lisa M. Nunez, is this your verdict?

MS. NUNEZ: Yes.

THE DEPUTY CLERK: Esquezelda F. Joseph, is this your verdict?

MS. JOSEPH: Yes.

THE DEPUTY CLERK: Casey A. Duhe, is this your verdict?

[p.118] MR. DUHE: Yes, ma'am.

THE DEPUTY CLERK: Wendy M. Dennis, is this your verdict?

MS. DENNIS: Yes.

THE DEPUTY CLERK: Elsie J. Daniels, is this your verdict?

MS. DANIELS: Yes.

THE DEPUTY CLERK: Fonda A. Garrett, is this your verdict?

MS. GARRETT: Yes.

* * *

Supreme Court, U.S.
FILED
JUN 7 - 2010

No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX, Volume 3

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A: En banc judgment and opinions of the United States Court of Appeals for the Fifth Circuit, filed August 10, 2009 . . . . . 1a

Appendix B: Panel opinion of the United States Court of Appeals for the Fifth Circuit, filed December 19, 2008 . . . . . 51a

Appendix C:
Order and Reasons of the United States
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TRIAL EXHIBIT #4

CRIMINAL INVESTIGATION BUREAU

Off. Off.
Date 12-6-84 Time 12:40 AM Item L5484-84
Off. 1745 Off.
Location Josephine Dist. 6
Type of Offense Armed Robbery/Homicide
Name of Business _____ Phone _____
Victim Ray J. Liuzza WM [redacted]-50
Address [redacted]
Phone _____
Weapon .38 or .357 pistol
Stolen Value _____ Recovered Value _____
XXX/Wanted/XXX Unknown NM 6', close cut hair, black jacket, blue jeans.

Description _____
Witness:

Det. Louis Berard along with assisting Dets. Ray Miller, John Miller, Donald Saucier and Sgt. James Eaton, assigned to the Homicide Division, upon reporting for work on 12-6-84 at 8:00 AM were assigned to assist Det. Donald Curole on the above Homicide by canvassing the area around Josephine and Baronne. Detectives checked the below listed addresses and spoke with the below listed persons:

2031 Baronne, multi-apartment building, got no response.

[redacted], Multi-apartment building, at apartment [redacted] spoke with Stephen McAlister WM 33 home phone [redacted] business phone 522-0548.

McAlister stated he was awakened by gun fire. Heard what he believed to be six shots and he ran to the front window almost immediately but he only saw the victim laying on the corner. McAlister stated he could see the victim because of a security light which was on the side of the building, 2032 Baronne, and the light was aimed in the direction of the victim. McAlister stated he did not see the perpetrator.

Also from apartment [redacted] Rosemary Cash WF 24 business phone 282-4455, who stated she was awakened by gunfire, heard six shots, and then she heard someone saying "No, No." She heard the same person yelling something else but she could not be sure what he was saying. She did not see the perpetraror

No response could be obtained from any of the other apartments at 2103.

2105 Baronne, No response.

[redacted], spoke with John Branella WM 25 and James Glade WM 28, who both stated that they did not get home until around 2:30 AM and by this time the police were already on the scene. Neither subject saw nor heard anything.

2032 Baronne, No response.

XXXXXXXXXXXXXX

2022 Baronne, No response.

[redacted], spoke with Evangelina Poisson WF 74 residing [redacted] home phone [redacted]; manager of the building, who stated she was awakened by Pam Staab,

who resides at [redacted]. Staab telephoned Poisson and told her that she heard shooting outside her apartment. Poisson stated she did not see anything.

[redacted], spoke with Sharon Robinson NF 39 home phone [redacted], who stated she heard four or five shots at about 12:55 AM. She did not see anyone.

[redacted], spoke with Theresa Hollins NF 37, heard one shot prior to police arriving on the scene. Did not see anyone.

[redacted], spoke with Mary Wilson NF 68, heard four, did not see anyone.

[redacted], spoke with Joseph Mizelle WM 55, sleeping and did not hear or see anyone.

1747 Josephine, No response.

Dets. summoned the S. & W.B. for the purpose of lifting the covers on the storm drains in the area. Dets. checked all the drains from the scene on Josephine to Brainard then to Brainard to St. Andrew, St. Andrew to Carondele and on Carondelet to the 1800 block. Dets. were looking for any evidence, i.e., weapon, victim's property, etc. None recovered.

Dets. later spoke with Officer Otho Stubbs, of the Crime Lab, who informed them that he had two pellets which were recovered from the scene. These pellets were either .38 or .357 and both were in very good condition for ballistics comparison.

Any further information will be submitted in a supplemental report.

Investigation continuing . . . . . .

DETS. ASSIGNED Det. Donald Curole DATE 12-6-84

Nº 004662 REFERENCES: SUPV SIGNATURE

TRIAL EXHIBIT #5

Off. Off.
Date 12-6-84 Time 12:40 AM Item L-5484-84
Off. Off.
Location 1745 Josephine Dist. 6
Type of Offense Murder
Name of Business _____ Phone _____
Victim Ray Liuzza
Address _____ Phone _____
Weapon _____
Stolen Value _____ Recovered Value _____
Arrested/Wanted/Accused _____
Description _____
Witness:

On 12-7-84 at 10:30AM, Det Donald Curole began reinterviewing the witnesses who were located by Officers of the Sixth District during their initial scene investigation.

Det Curole first interviewed Miss Pamela Staab WF [redacted]-62, residing [redacted] Miss Staab told Det Curole that she was asleep in the bedroom of her apartment when she was awaken by ound voices coming from the sidewalk outside her bedroom window. Miss Staab recognized the first voice as that of her neighbor, Ray Liuzza. Miss Staab heard Mr. Liuzza say, in an excited voice, " take my wallet, please go ahead and take it". Following a short pause she heard Mr. Liuzza say "here, go ahead and take my watch". She then heard another voice say "man, I got to shoot you", or words to that effect. She then heard a number of gunshots fired, but was unsure how many. Miss Staab remained in her bed during this time and never looked out of the window. After hearing the

shots fired, she ran to the bedroom of her roommate, Miss Nora Mestayer, and told her "Ray has just been shot." Miss Staab said that Mr. Liuzza was "very insistant" in telling the robber to take his property, and strongly believes that he offered the robber no resistance. Miss Staab offered no further information during this interview.

At 11AM, Det Curole interviewed Miss Nora Mestayer WF [redacted]-61, residing [redacted], at her office at [redacted] Miss Mestayer stated that she was awaken by the sound of loud voices outside her apartment but could not understand what was being said. Just after waking, Miss Mestayer heard several gunshots fired in rapid succession, followed by the sound of someone xx running. She was unable to speculate on the direction this person ran, or how many people may have been running. Miss Mestayer had nothing further to add to this investigation.

At 11:30AM, Det Curole interviewed Mr. Paul Schliffka WM [redacted]-62, at his residence, [redacted] Mr. Schliffka stated that he had just walked from his apartment to his car and was in the process of opening the door, when he heard several gunshots fired around the corner on Josephine St. Upon looking toward Josephine St, Mr. Schliffka observed a black male, early 20's, 6' tall, slim build, dark complextion, short hair, wearing a black nylon jacket and dark colored pants running across Baronne St on Josephine St, toward Dryades. This man still carried a large, blue steel revolver with a 4" barrel in his right hand as he ran from the scene. After the man crossed Baronne St, Mr. Schli-fka ran to the intersection and watched the perpetrator as he continued running up the east

sidewalk of Josephine St toward Dryades. Mr. Schliffka lost sight of the perpetrator when his attention was drawn away by the sound of Mr. Liuzza moaning. Mr. Schli-fka stated that he only saw this person for a very short time as he ran across Baronne St, and never got a good look at his face. Mr. Schliffka stated that he may recognized this man should he see him again, but did not think he could provide the details required for a composite drawing of the suspect. Mr. Schliffka did say that he was positive that the man the police returned to the scene, Ronald Robinson, was not the xxx xx man he observed running from the scene of the shooting.

Det Curole next interviewed Miss Susan Crane WF [redacted]-58, residing [redacted] Miss Crane stated that she and her husband were sitting in the living room watching television at about 12:40AM when they heard the sound of gunshots fired outside. Miss Crane said that she did not hear any conversation prior to the gunshots, and did not look outside following the gunshots. Before concluding this interview, Miss Crane mentioned that she and a friend were the victims of an armed robbery which occured alongside her apartment in June of this year. Mi-s Crane stated that the circumstances of her robbery, and the description of the man responsible were very similar to that of the incident involving Mr. Liuzza. Miss Crane had no additional information to lend to this investigation.

At 3PM, Det Donald Curole met with Mr. Bill Brown, Chief of Security for the International Hotel at his office. During this interview Mr. Brown provided Det Curole with Mr. Liuzza's American Express Card account number, which was [redacted] Mr. Brown

also indicated that Mr. Liuzza normally carried credit cards for Saks Fifth Ave and Tiffany's of New York. At the time of this interview, Mr. Brown had already notified American Express of the theft, and was in the process of notifying the other establishments

Mr. Brown stated that earlier in the day, his office received a telephone call from a negro male who identified himself as "freddie", and gave his address as [redacted] This caller stated that he knew the identity of the person that shot Mr. Liuzza, and would call back soon with the information. The man then hung up the phone without providing any further information.

Mr. Brown then provided some background information on the victim, Ray T Liuzza. According to Mr. Brown, Mr. Liuzza had been with the Hotel since 1976 and had just recently been promoted to Vice President. Mr. Liuzza had no problems with anyone at the hotel, and had very little contact with its employees. Mr. Liuzza had no power to hire or fire anyone employed there. Mr. Brown advised Det Curole that he had received information that Liuzza was possibly homosexual, and had strong evidence to indicate that he regularly used cocaine. Mr. Brown then suggested that Det Curole interview Mr. Chris Braiwick, who was Mr. Liuzza's closest friend, and Miss Jody Beauregard, who was his longtime girlfriend. Both of these people would be able to provide additional background information on the victim, which Mr. Brown did not possess.

At 4PM Det Curole met with Mr. Ray A. Liuzza, who is the father of the victim, and President of the International Hotel. Mr. Liuzza told Det Curole that

he was still attempting to determine what property was taken from his son during the robbery, but was certain his wristwatch and ring would be two of the articles taken. He described the watch as a Cartier Tank watch, with a small square white face, blank numerals and a black leather band. Mr. Liuzza could not provide a description of the ring, but indicated that the articles of jewerly were probally purchased at Adler's Jewerly on Canal St. Due to his emotional state, Mr. Liuzza was unable to continue with the interview.

At 4:20PM, Det Curole contacted Adler's and spoke to Mr. Schiffer Michaels who identified himself as a longtime friend of Ray T. Liuzza. Mr. Michaels informed Det Curole that he kept a file of the articles purchased at Adler's by Mr. Liuzza, and promissed to research the file and provide Det Curole with a list of jewerly owned by the victim. Mr. Michaels promissed to contact Det Curole as soon as this list was prepared.

On Saturday December 8, 1984 at 2PM, Det Curole met and interviewed Miss Sheri Hartman WF [redacted]-49, residing [redacted] Miss Hartman told Det Curole that while in her apartment, at about 12:30AM, she heard six distinct gunshots fired outside on Baronne St. Miss Hartman first looked out of her side window, which faces Josephine St, but upon seeing nothing ran to the front of her apartment. Miss Hartman walked out onto her balcony and observed a blond haired man, whom she stated lives across the street, kneeling over a body on the side of the house at 2032 Baronne St. Miss Hartman then ran downstairs to the scene and realized that the victim was Mr. Liuzza. She stated that she never saw anyone else near the scene, or fleeing the scene after hearing the

shots fired. Miss Hartman had no further information to lend to this investigation.

At 2:30PM, Dets Curole and Demma interviewed Miss Angie Poisson WF [redacted]-10. who is the manager of the apartment complex in which Mr. Liuzza resided. Miss Poisson had no knowledge of the shooting incident, but related that she had been the victim of an armed robbery which occured in front of her residence at [redacted] approximately four or five months ago. She indicated that the robber was young, about 6' tall, and was armed with a large black gun which he stuck to her head as he demanded money. Miss Poisson provided no further information during this interview.

At 3PM, Dets Curole and Demma interviewed Mr. Logan Faust WM [redacted]-62, who resides at [redacted], in the apartment downstairs from Mr. Liuzza's. Mr. Faust stated that he first believed that he heard Mr. Liuzza enter his apartment at about 12:30AM, just prior to the shooting, but now believed that the footsteps he heard belonged to the people occuping the rear apartment. Mr. Faust said that he heard six shots fired at about 12:30AM, but saw nothing. Mr. Faust had no additional information to lend to this investigation.

At 5PM, Dets Curole and Demma reinterviewed Miss Susan Steiner in the offices of the Homicide Division. During this interview, Miss Steiner indicated that she had only known the victim for a short time and had not had sexual relations with him. Miss Steiner told the investigators that she had heard a rumor that Mr. Liuzza was gay, but had no personal knowledge to that effect. She also indicated that she

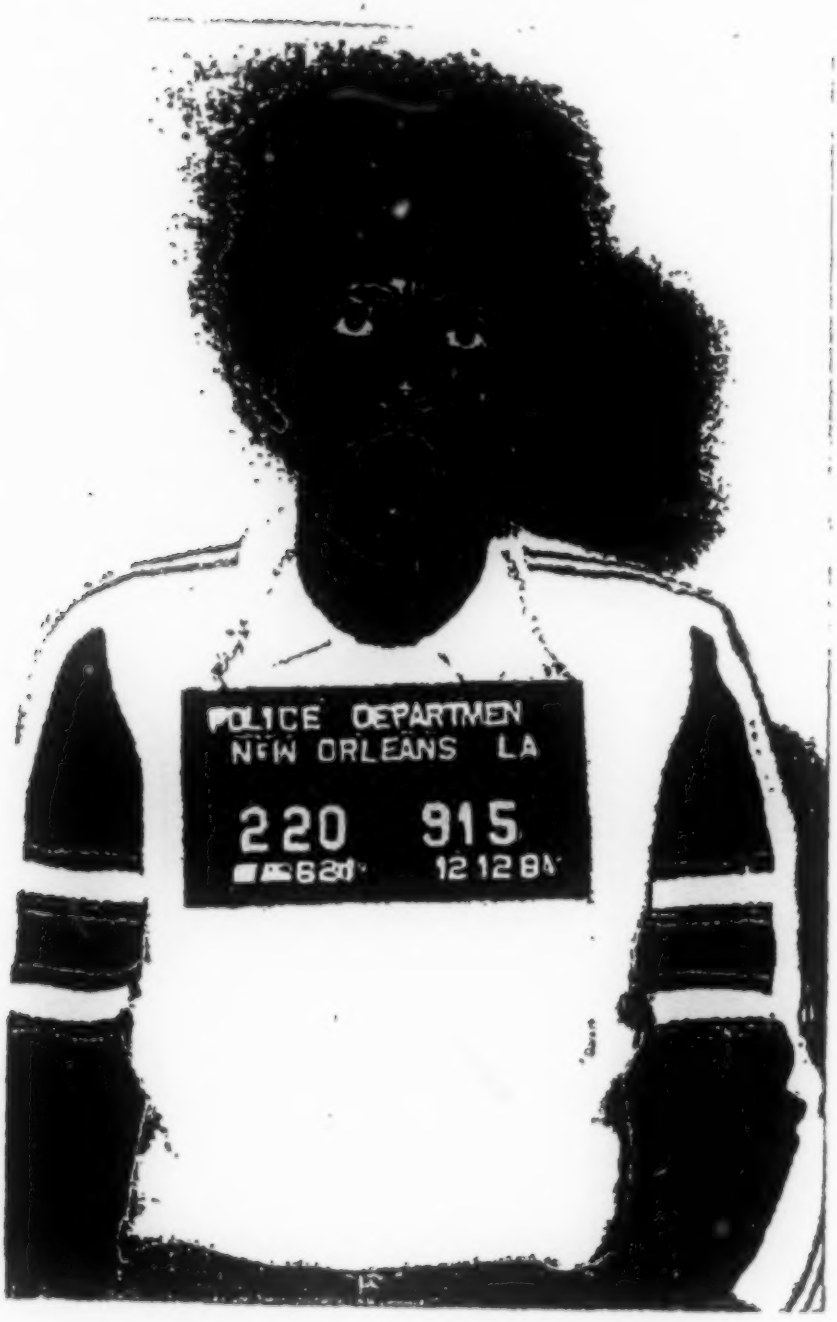
had no knowledge of Mr. Liuzza's cocaine use, but would not be surprised if he did. She did mention that she knew very little of Mr. Liuzza's personal habits, and suggested that the Dets speak to Mr. Cris Braiwick, whom she identified as his close friend. Before concluding this conversation, Miss Steiner mentioned that Liuzza and Braiwick were into gambling, but provided no details. No further information was collected during this interview.

INVESTIGATION CONTINUING

/s/ Donald Curole
DET DONALD CUROLE
/s/ Marco Demma
DET MARCO DEMMA

DETS. ASSIGNED Det. Donald Curole
DATE 12-8-84
Nº 004700 REFERENCES:
SUPV. SIGNATURE Sgt David Morales

TRIAL EXHIBIT #7



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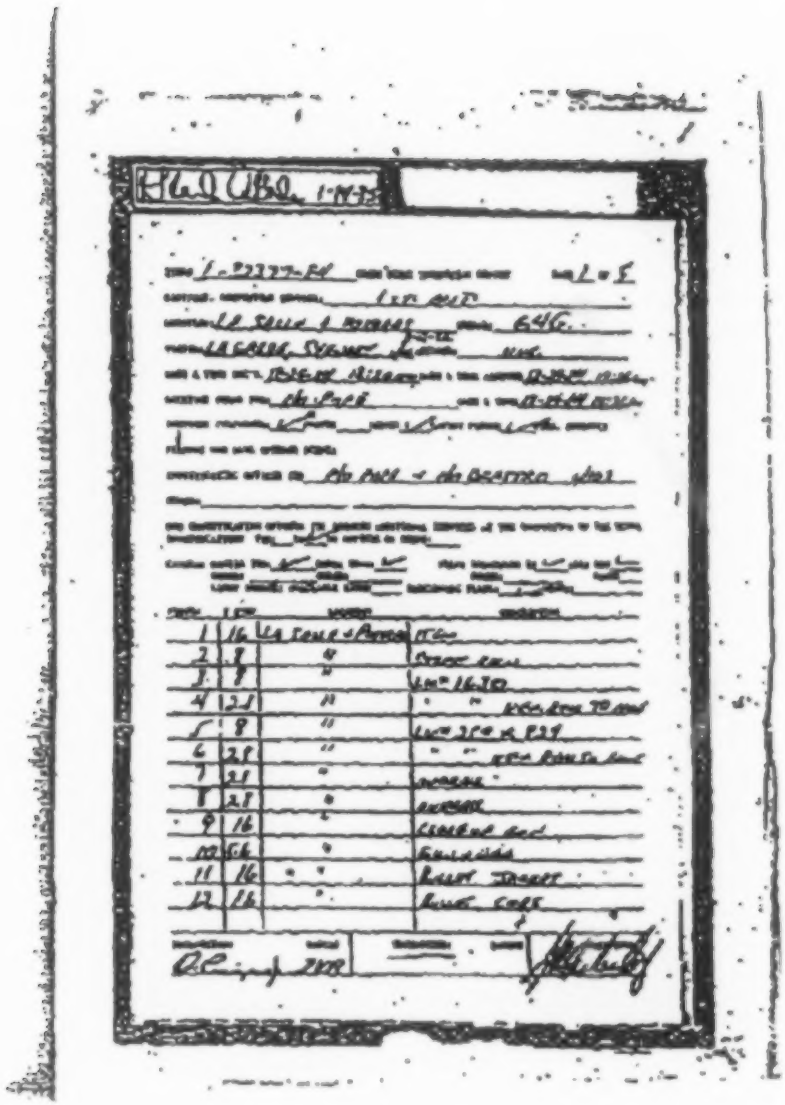
TRIAL EXHIBIT #22
Crime Scene Technician Report—
Armed Robbery Case

[Fold-out Exhibit, see next 9 pages]



[illegible] 1-14-75

[illegible] 1-[illegible] [illegible] 1 of 5

[illegible] 1st [illegible]

[illegible] LA SALLE & [illegible] [illegible] 646

[illegible] LA GRANGE, [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

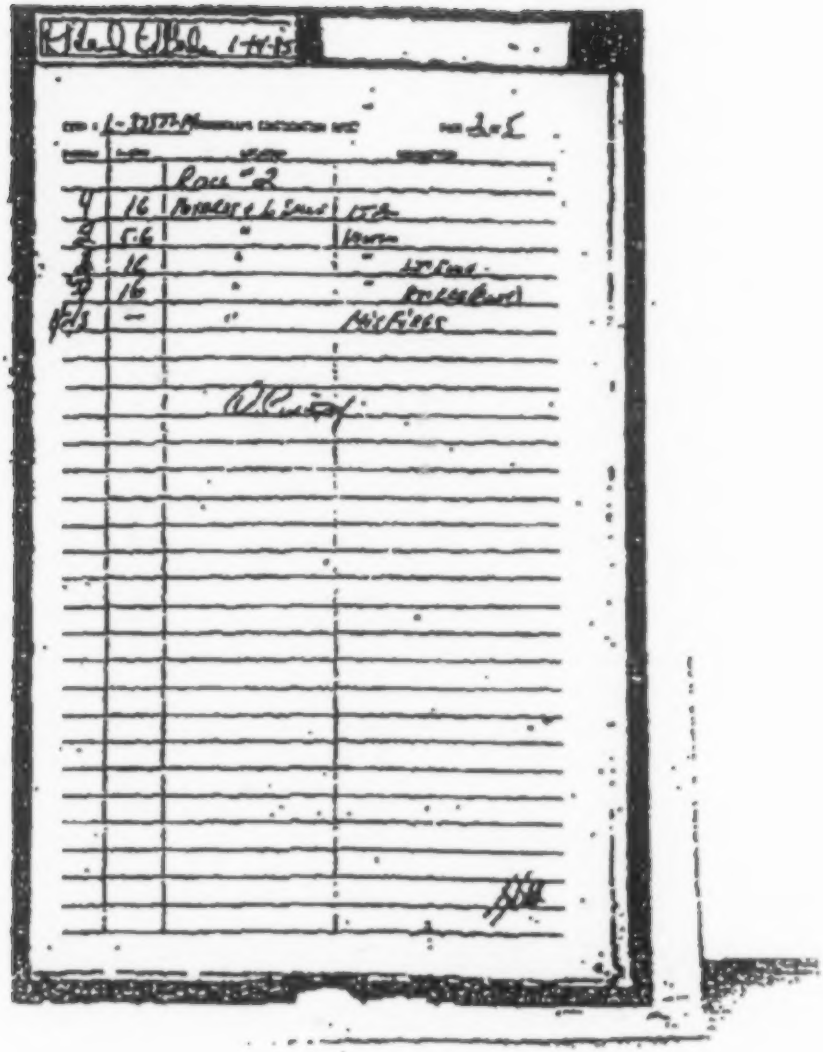
[illegible] [illegible] [illegible] [illegible]

[illegible]	[illegible]	[illegible]	[illegible]
1	16	LA SALLE & [illegible]	[illegible]
2	8	"	[illegible]
3	8	"	[illegible]
4	21	"	" " [illegible]
5	8	"	[illegible]
6	28	"	" " [illegible]
7	21	"	[illegible]
8	28	"	[illegible]
9	16	"	[illegible]
10	56	"	[illegible]
11	16	"	[illegible]
12	16	"	[illegible]

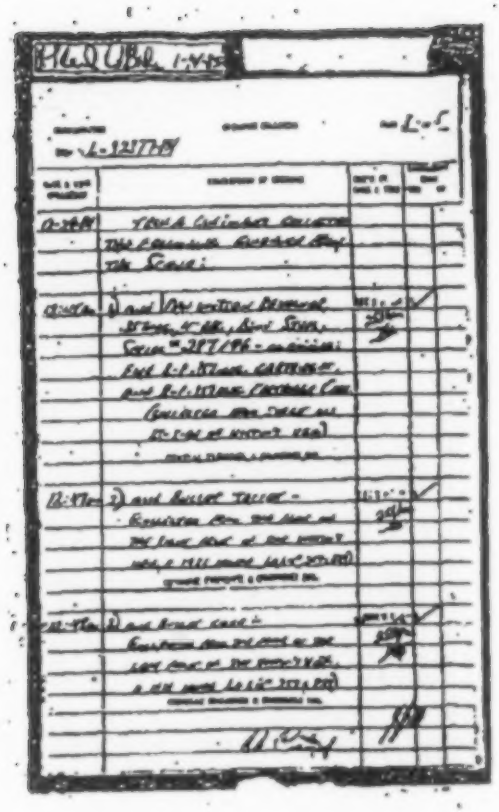
[illegible] [illegible] [illegible] [illegible]

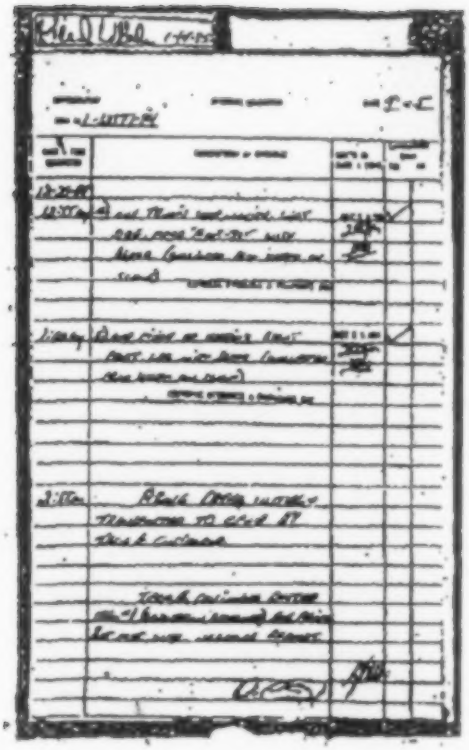
[illegible]

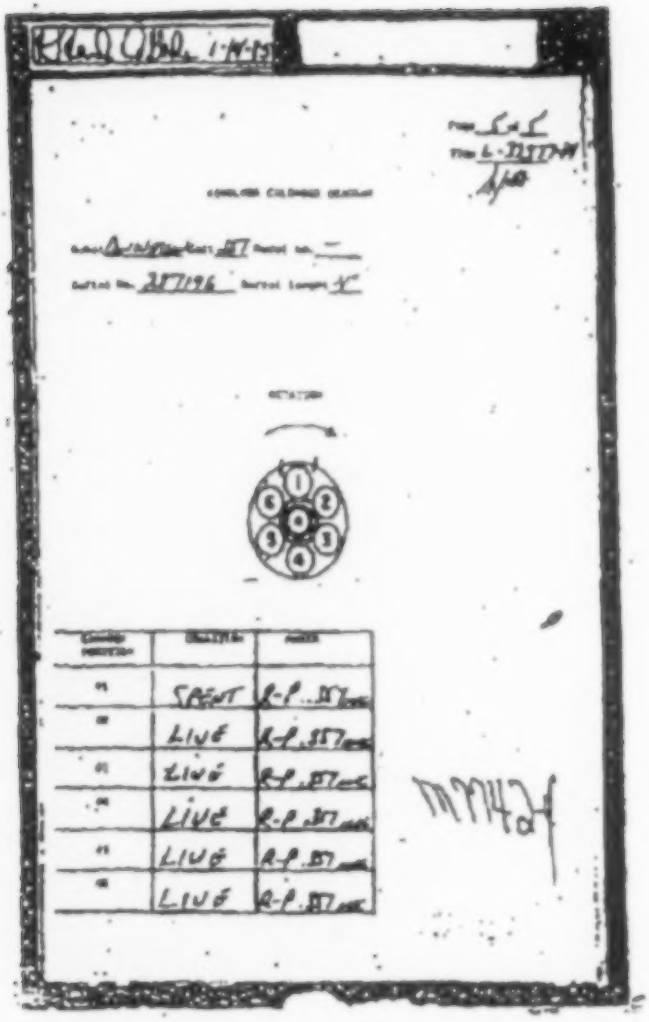
EX 000053



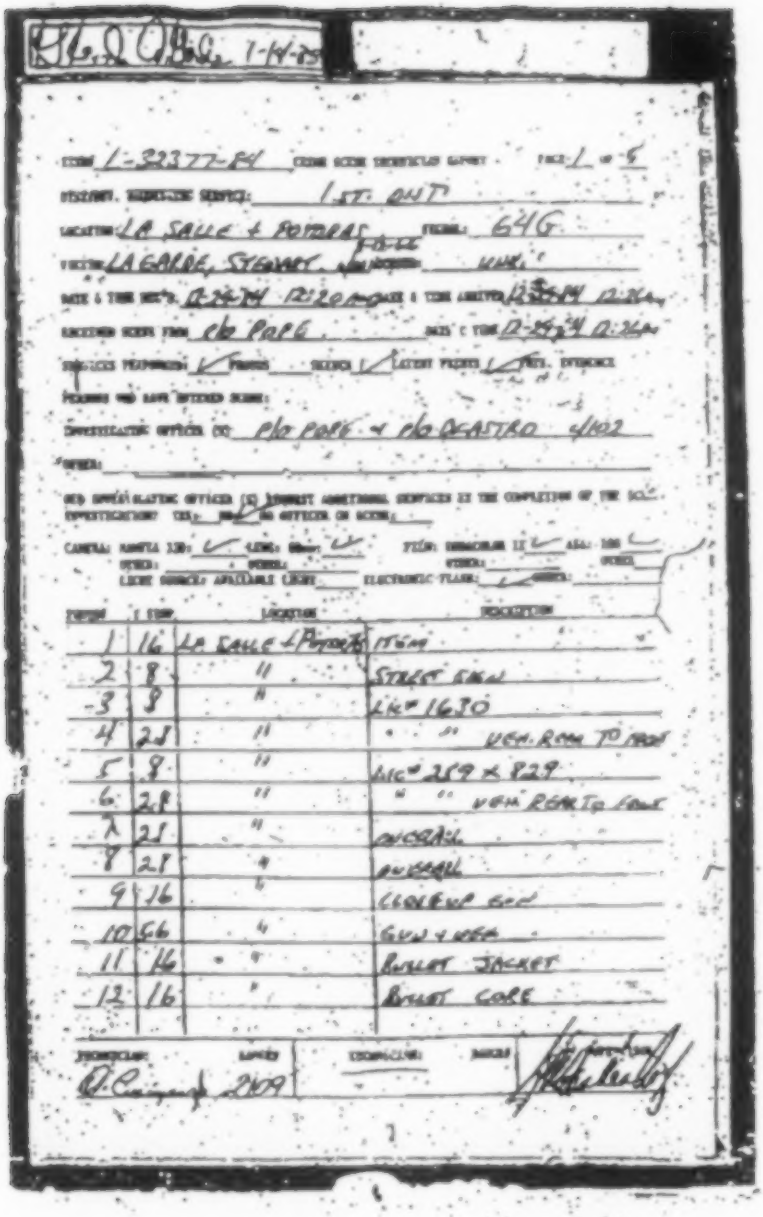
EX 000054





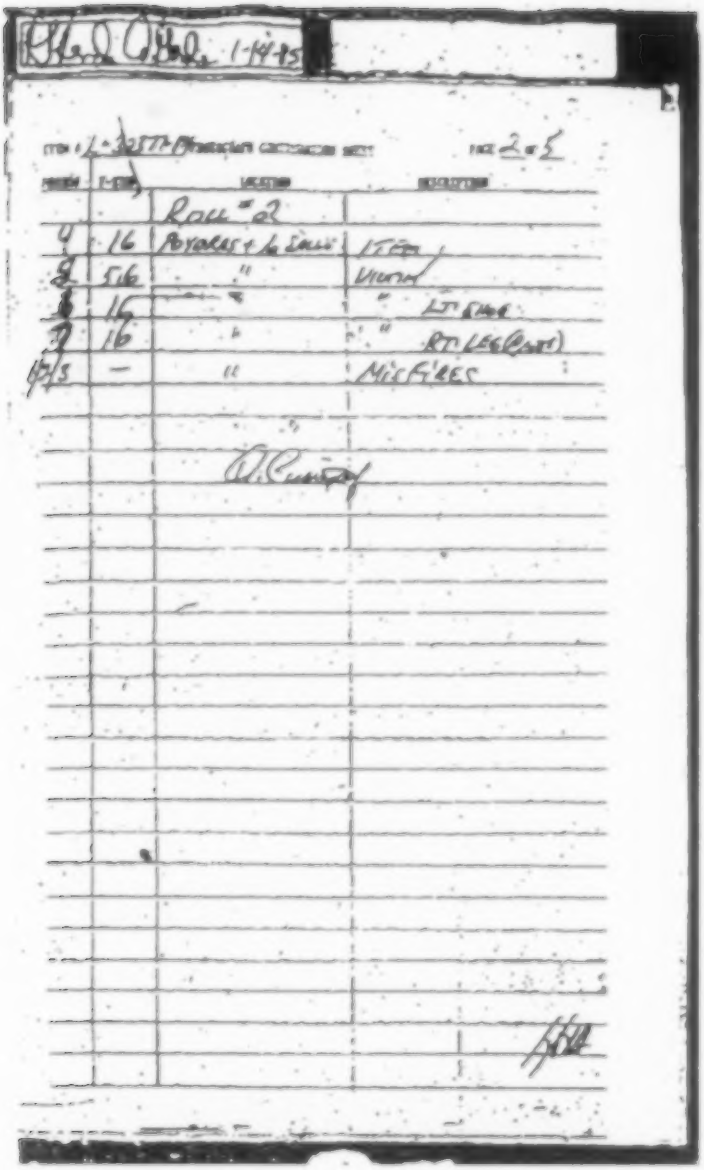


	SPENT	R-P .357
	LIVE	R-P .357
	LIVE	R-P .357
	LIVE	R-P .357
	LIVE	R-P .357
	LIVE	R-P .357



ITEM	# ITEMS	LOCATION	DESCRIPTION
1	16	LA SALLE & PERSHING	ITEMS
2	8	"	STREET SIGNS
3	8	"	LIC# 1630
4	28	"	" " VEH. ROAD TO FRONT
5	8	"	LIC# 259 & 829
6	28	"	" " VEH ROAD TO FRONT
7	21	"	OVERALL
8	28	"	OVERALL
9	16	"	CLOSEUP GUN
10	66	"	GUN & AREA
11	16	"	BULLET JACKET
12	16	"	BULLET CORE

EX 000058



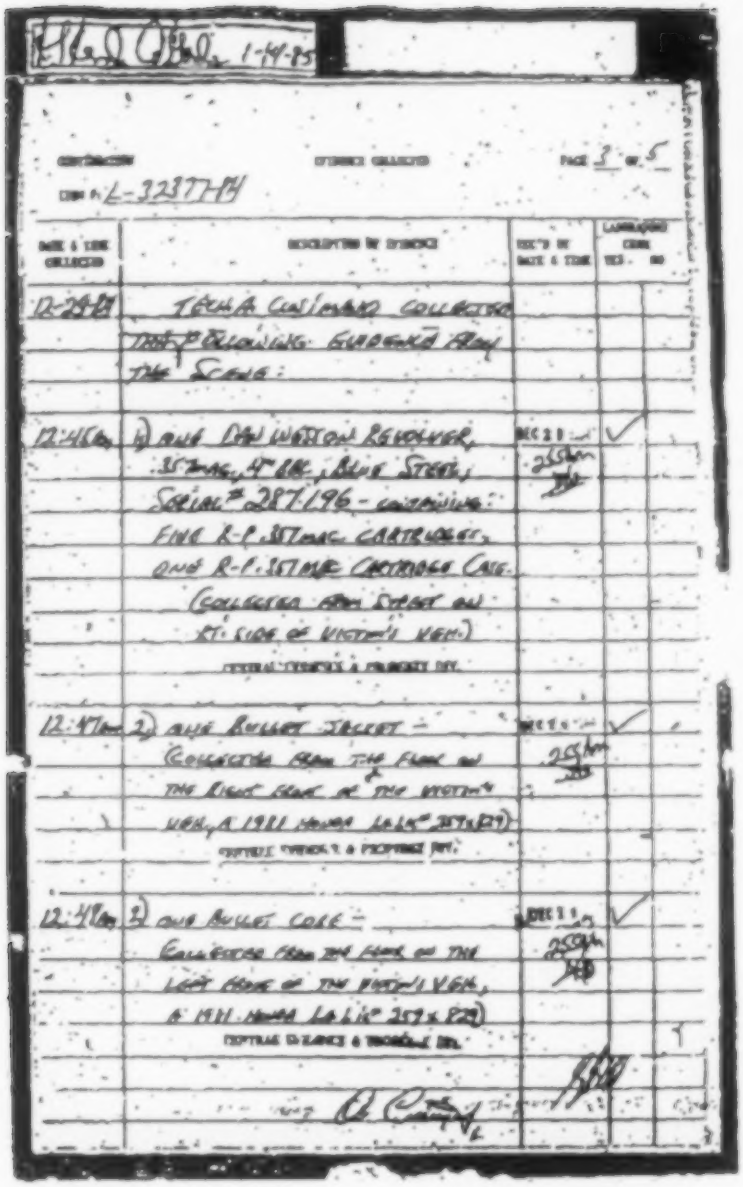
[illegible] 1-14-85

ITEM # L-325TH [illegible] PAGE 2 of 5

[illegible]	[illegible]	LOCATION	DESCRIPTION
		ROLL #2	
4	16	POYORES + 6 SALLS	ITEM
5	5.6	"	VICTIM
6	16	"	" LT SHOE
7	16	"	" RT LEG (PANTS)
4/5	—	"	MISFIRES

[illegible]

[illegible]



[illegible] 1-14-85

CONTINUATION — EVIDENCE COLLECTED — PAGE 3 OF 5

ITEM #: L-32377-PH

DATE & TIME COLLECTED	DESCRIPTION OF EVIDENCE	REC'D BY DATE & TIME	LABORATORY CHECK YES	NO
12-29-84	TECH A CONIMAND COLLECTED THE FOLLOWING EVIDENCE FROM THE SCENE:			
12:45am	1) ONE DAN WESSON REVOLVER, .357 MAG, 4" BBL, BLUE STEEL, SERIAL # 287196 - CONTAINING: FIVE R-P .357 MAG CARTRIDGES, ONE R-P .357 MAG CARTRIDGE CASE. (COLLECTED FROM STREET ON RT. SIDE OF VICTIM'S VEH.) CENTRAL EVIDENCE & PROPERTY DIV.	DEC 2 1 [illegible] 255 [illegible]	✓	
12:47am	2) ONE BULLET JACKET - (COLLECTED FROM THE FLOOR ON THE RIGHT FRONT OF THE VICTIM'S VEH, A 1981 HONDA LA LIC# 259x829) CENTRAL EVIDENCE & PROPERTY DIV.	DEC 2 1 [illegible] 255 [illegible]	✓	
12:49am	3) ONE BULLET CORE - (COLLECTED FROM THE FLOOR ON THE LEFT FRONT OF THE VICTIM'S VEH, A 1981 HONDA LA LIC# 259x829) CENTRAL EVIDENCE & PROPERTY DIV.	DEC 2 1 [illegible] 255 [illegible]	✓	

[illegible]

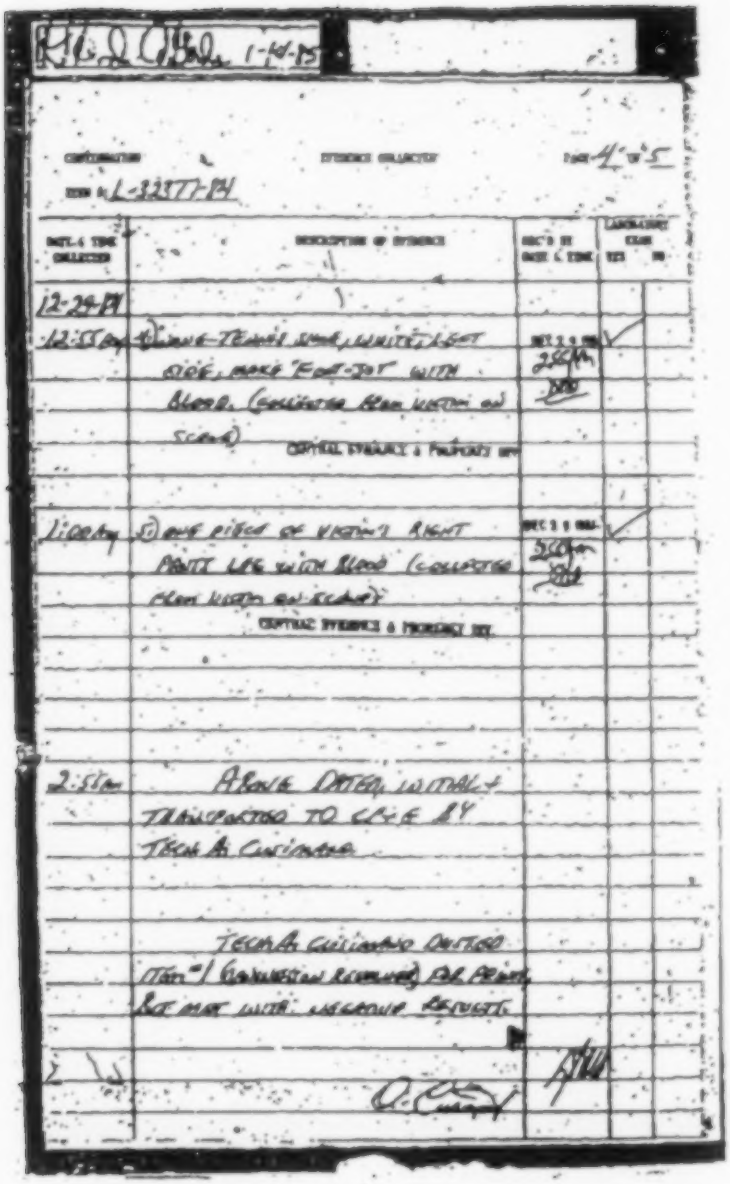
15A

EX 000060

[illegible] 1-14-85

CONTINUATION — EVIDENCE COLLECTED — PAGE 4 OF 5

ITEM #: L-32377-84



DATE & TIME COLLECTED	DESCRIPTION OF EVIDENCE	REC'D BY DATE & TIME	LABORATORY EXAM YES	NO
12-29-84				
12:55 AM	(4) ONE TENNIS SHOE, WHITE, LEFT SIDE, MAKE "FOOT-JOB" WITH BLOOD. (COLLECTED FROM VICTIM ON SCENE) CENTRAL EVIDENCE & PROPERTY DIV.	DEC 2 9 1984 2:55 AM [illegible]	✓	
1:00 AM	(5) ONE PIECE OF VICTIM'S RIGHT PANTS LEG WITH BLOOD (COLLECTED FROM VICTIM ON SCENE) CENTRAL EVIDENCE & PROPERTY DIV.	DEC 2 9 1984 2:55 AM [illegible]	✓	
2:55 AM	ABOVE DATED, INITIAL + TRANSPORTED TO CP+E BY TECH A. CUSIMANO.			
	TECH A. CUSIMANO DUSTED ITEM #1 (CONNECTION RECEIVER) FOR PRINTS, BUT MET WITH NEGATIVE RESULTS.			
	[illegible]	[illegible]		

EX 000061

TRIAL EXHIBIT #23

Off. Off.
Date 12-6-84 Time 12:40 AM Item L-5484-84
Off. Off.
Location Josephine Dist. 6
Type of Offense Murder
Name of Business _____ Phone _____
Victim Ray T. Liuzza
Address _____ Phone _____
Weapon _____
Stolen Value _____ Recovered Value _____
Arrested/Wanted/Accused _____
Description _____
Witness:

On Sunday January 13, 1985 at 4:30PM, Det Ronald Brink of the Homicide Division received information via telephone from Mr. Frank Maselli, who is the owner of the property where Liuzza resided. Mr. Maselli told Det Brink that at about 4PM, Sunday January 13, 1985, a negro male subject was observed attempting to enter the locked iron gate in front of the apartment complex where Liuzza resided. The manager of the apartment complex, Angie, opened her front door and asked the negro male who he was looking XXX for. The man replied "Angie, I'am looking for you". The subject then informed Angie that he knew who killed Liuzza, and wanted to tell the family what he knew. Following this conversation, Angie telephoned Mr. Maselli, who related the information to Det Brink. After speaking to Mr. Maselli, Det Brink contacted Det Demma and informed him of the conversation.

At 4:40PM, Det Demma telephoned Angie Poisson who related the following. At about 4PM, Angie heard someone rattling the iron gate outside her apartment. Angie opened her front door, to find a negro male subject attempting to open the iron gate. Angie asked the negro male whom he was looking for and he replied "Angie, I'am looking for you". Angie told Det Demma that she did not know this man, but was not surprised because many people in that neighborhood know of her. The suspect told Angie that he knew who killed Liuzza. He then stated thathe wasxx scared and he could not stand outside for long, for fear he might be seen talking to her. He then asked xxx Angie if he knew how to get in touch with Liuzza's family because he wanted to tell them personally who the killer was. Angie promissed to get in touch with Liuzza's family, and then gave the negro male her telephone number and told him to call her back. After this the negro male left.

At 6PM Det Demma again contacted Angie who stated that at about 5:20PM, the subject who had rattled her front gate earlier telephoned her home. During this conversation the subject told Angie that he knew who killed Ray Liuzza and that the killer lived somewhere on Dryades St. The negro male subject went on to tell Angie that two negro male subjects attempted to rob Liuzza and that during the robbery attempt one of the subjects shot the victim. When the first subject began shooting, the second subject fled the scene. The man then said that the subject that shot Liuzza stole his wallet, which contained no money but several credit cards, a watch, and a ring. The caller went on to say that the man that shot Liuzza was now planing to kill his accomplise because he was afraid he would talk. This killing was supposed to take place on

New Years Eve, but for some unknown reason it did not take place.

While Angie was talking with the negro male subject on the telephone a negro female picked up the line and identified herself as the mother of the caller. This woman told Angie her sone was telling the truth about the murder of Liuzza. This woman indicated that her son was very scared because the person responsible for the murder knew her son would be able to identify them. Since Liuzza's murder, the woman's son has been very sick, and has not been able to eat or sleep with this incident on his mind. He then decided he had to tell someone, so he decided to tell Liuzza's family.

Angie asked the negro male subject why he didn't want to give this information to the police handling the investigation. The negro male subject told Angie he had spoken with homicide detectives, but the detectives thought the subject was not telling the truth and was only interested in the reward. The subject then advised Angie that he would call her back to ascertain whether or not Angie had gotten in touch with L-uzza's family. He then hung up.

At 11:58AM, Monday January 14, 1985, Det Demma received a telephone call in the Homicide Office from Angie Poisson. Angie told Det Demma that she had just received another call from the negro male, at approximately 11:50AM, who stated that he would meet with Liuzza's family at the International Hotel at 4PM this day. He then informed Angie that he would call back at 1PM to confirm the meeting.

At 1PM, the negro male again telephoned Angie, who informed him that the meeting he requested had been arranged. The negro male then said that he would go to the front desk at the hotel and ask for Mr. Liuzza. During these conversations the subject repeatedly voiced his concern that Angie would notify the police of the meeting. Before hanging up, he again asked Angie not to call the police on him.

At 3PM, Dets Curole, Demma and Folmer arrived at the International Hotel and spoke with the Security Manager, Mr. Bill Brown. Upon being briefed, Mr. Brown agreed to meet with the negro male subject in xxxxxx place of Mr. Liuzza. Mr. Brown also agreed to have a recording device installed in the office where the meeting was scheduled.

At 4:20PM, Mr. Brown was met in his office by a young negro male subject who refused to identify himself. Mr. Brown escorted the negro male into his office and informed him that Mr. Liuzza was unavailable at this time, and requested that Mr. Brown speak to him. The man, later identified as Richard Perkins, alais "Funk", told Mr. Brown that two friends of his were involved in the robbery, but only one shot Liuzza. He then stated that these two people told him of the incident, and would kill him if they found out he was telling someone what he knew. He also mentioned that the triggerman intended to shoot his accomplice because he left him at the scene during the robbery.

Perkins said the two men, whom he refused to name, attempted to set him up, but did not say how. He then said they also set up another friend by selling him the gun used in the killing, along with the ring

and a watch that were taken during the robbery. He told Mr. Brown that the perpetrators did not get any money, and sold the peoperty to acquire some money. He identified the property stolen as a ring, a watch, and a wallet that contained four credit cards, but no money.

Perkins described the gun as a 35 magnum or a 45 magnum, he did not remember which. He then admitted that the perpetrator gave him the gun after the shooting and asked him to sell it for him, which he did. Perkins said that at the time of the sale, he did not know that the gun was involved in any crime. He also indicated that he knew who he sold the weapon to, and that this person still had the gun.

He would not identify the two perpetrators by name, but indicated that they both live in the area, one with his grandmother. He said that both men were scared, and no longer come out of their houses after dark.

After this , Perkins told Mr. Brown that a friend of his, whom he identified as an insurance man, recorded all of the information on paper, and would meet with Liuzza and turn the information over to him. Perkins said that his friend gets off of work at 5PM after which he would come to the hotel with Perkins and speak with Liuzza.

Before leaving, Mr. Brown asked Perkins if he would give him his name. He then identified himself as Richard, and said he goes by the street name of "Funk". Mr. Brown then asked him if he would be willing to provide him with his Social Security number for identification purposes. Instead of reading his

number, he handed his Social Security card to Mr Brown, who recorded the number as well as the subjects name. The name on the card was Richard Perkins. Following this Perkins left, promissing to return with his friend at 5PM.

Following this meeting, Det Curole ran the name Richard Perkins through the Criminal Records file of the New Orleans Police Department and located a Richard Perkins NM [redacted]-65, alais "Funk", residing [redacted] as of July of 1983. This subjects record reflected previous arrests for Obstructing a street, and placing garbage in the street. This record also listed Perkins Social Security number, which matched that given by the subject at the meeting.

Dets Curole, Demma and Folmer remained at the International Hotel until 7PM that evening, but received no further word from Perkins.

At 8:30PM Monday January 14, 1985, Mr. Brown received a telephone call from Funk at the Hotel. Perkins advised him that he and his friend would arrive at the Hotel at 9:30PM and demanded to meet with Mr. Liuzza. Perkins indicated that the meeting would have to take place at the time, and under the circumstances he specified or else the deal was off. Mr. Brown then arraigned the meeting, after which he notified Dets Curole and Demma. The Dets then notified Det Folmer who again installed a recording device in the office of Mr. Liuzza.

At 9:40PM, Richard Perkins and his friend, Gregory Dawson, arrived at the International Hotel and met with Bill Brown and Mr. Ray. A. Liuzza. During this meeting, Perkins identified the triggerman

as John Thompson, and his accomplice as Kevin Fremen, alais Kojak. Perkins said that the two were out crusing the street looking for someone to rob when they happened upon Liuzza. Believing that he carried a lot of money because he dressed nice and lived in a nice house, they decided to rob him. Both Thompson and Freman were initially involved in the robbery, but Freman apparently had second thoughts and left Thompson before he completed the act. Freman ran to his vehicle, which he described as a 1975 Monte Carlo, burgundy with a white top, and drove off. Before departing, Freman heard the gunshots. Perkins repeated that Thompson stole a watch, a ring, and a wallet containing credit cards but no money from the victim.

Perkins described both Thompson and Freman as friends of his. Following the incident, both Thompson and Freman told Perkins about the robbery. Thompson stated that Liuzza was going to grab the gun, which forced him to shoot him. Three days after the robbery, Thompson gave Perkins a gun which he asked him to sell for him. He described the gun as a large black pistol with brown wooden handles. He later sold the gun to a man known to him as J.R., who still has the weapon in his possession. Thompson also gave the other property, the ring, watch and credit cards to other people to sell to J.R.

Freman told Perkins that they were out looking for someone to rob and that he know that Thompson had the gun, but didn't think that he would shoot anyone. They purposely cruised the St Charles Ave area looking for a white man to rob because they believed the people in that area were rich and carried a lot of cash. When he realized that Thompson intended to

shoot Liuzza, he left him and ran to his vehicle. As he reached his vehicle, he heard several gunshots, at which time he entered his vehicle and drove away. Freman now believes that Thompson wants to kill him to keep him from telling the police about the robbery. Freman also told Perkins that a WOMAN saw him driving away from the scene.

Perkins told Mr. Brown that he called Crimestoppers twice and gave the above information to Det Williams, but refused to provide his name. At the end of the meeting, Perkins indicated that he would be willing to meet with Homicide Detectives and tell them what he knew, as long as he remained anonymous.

Both cassette tapes on which these meetings were recorded are now contained in the case file.

INVESTIGATION CONTINUING

/s/ Donald Curole
DET DONALD CUROLE
/s/ Marco Demma
DET MARCO DEMMA

DETS. ASSIGNED Det. Donanld Curole and Marco Demma DATE 1-15-85
Nº 005066 REFERENCES:
SUPV. SIGNATURE Sgt David Moreles

TRIAL EXHIBIT #24

NEW ORLEANS POLICE DEPARTMENT
CRIMINAL INVESTIGATION BUREAU
HOMICIDE DIVISION
WEDNESDAY JANUARY 16, 1985

Item L-5484-84

The following is the statement of Richard Alphose Perkins NM [redacted]-64, residing [redacted], relative to his knowledge of the death of Ray T. Liuzza, WM which occured in the 1700 block of Josephine St on Thursday December 6, 1984 at 12:40AM.

Q. denotes questions asked by Det Donald Curole
A. denotes answers provided by Mr. Richard Perkins

*******STATEMENT*******

TIME BEGAN 2:11 PM

Q. For the record, what is your full name, date of birth, residence address, and telephone number.
A. Richard Alphonse Perkins, [redacted]-64, [redacted], I don't have a phone.

Q. Richard do you work.
A. I don't work.

Q. Who do you live with on [redacted]
A. My mother.

Q. What is your mother's name.

A. Pernella Perkins.

Q. Richard, did you graduate from high school.
A. No.

Q. What was the last school you attended, and what grade level were you in.
A. Fortier, I made it to the eleventh grade.

Q. Can you read and write.
A. A little bit, I was in special ed classes.

Q. Richard, I understand you spoke to Mr. Brown earlier concerning the murder of Mr. Liuzza. Do you know the names of the people who murdered Mr. Liuzza.
A. John Thompson and Kevin Freeman.

Q. How well do you know these people.
A. Since I moved around the neighborhood, I guess about four years.

Q. Richard, I want you to look at this first set of photographs, and tell me if you recognize anyone.

[unreadable initials]
[GD. 1-16-85]
[RP 1-16-85]
[unreadable initials 1/16/85]
[DJC 1-16-85]

A. This is John Thompson (NOTE: Mr. Perkins has just identified the photograph of John Thompson. The time is now 2:18PM, Wednesday January 16, 1985.)

Q. Are you positive that this man in the photograph is the same man that killed Mr. Liuzza.
A. Yea, thats him

Q. OK Richard, I want you to sign your name to the back of the picture you identified, along with the date and time, and then place your initials and the date on the other photographs.
A. What is the time. (Curole, "its 2:18PM).

Q. OK Richard, I want you to look at another set of photographs and tell me if you recognize anyone in these pictures.
A. Yes, that Kevin Freman. (NOTE: Mr. Perkins has just identified the photograph of Kevin Freman. The time now is 2:22PM, Wednesday January 16, 1985)

Q. Are you positive that this is the man involved in the murder of Mr. Liuzza.
A. Yea.

Q. OK, again I want you to sign your name to the back of the photograph you identified, along with your, excuse me the time and date, and place you initials and the date on the remaining photographs.
A. No verbal response.

Q. The time is now 2:22PM.
A. No verbal response.

Q. Ok Richard, I would like you now to tell me in your own words how you know that these two people were involved in the killing of Ray Liuzza.
A. About three days after the murder, John came to me and asked me if I knew anybody that wanted to

buy this gun. I asked him what was wrong with it and he told me that he let a friend of his use it and they went out and was robbing with it and they shot somebody. So then he said "I know somebody", and we said he wanted to bring it to JR. He told me that he would bring it to J.R. and he would wait outside while I went in and sold the gun. He must have had the ring in his pocket at the time cause later that night he went into the barroom and showed another friend of mine the ring. So we walked to the project, and he waited in the project while I went and saw J.R. in his house. So then I come outside and gave him the money, and then we split up.

I could see that the dude had something on his mind, but I didn't know the gun had any charges on it when I sold it. So a couple of days later, I see the man on television talking about the murder, and I knew that that's what John had did with the gun. Right after that John went to jail for an attachment. About a week after that he got out and he was all happy, figuring that it was off his mind since he took that little arrest.

When he got out, some of his friends told him that Kevin was running his mouth about it and telling people he did it. About three days before John got out of jail, I was walking with Kevin and he was full of them clickers and he started telling me about it. I had asked him why somebody else had done that, and he said, Man don't let John tell you that. He the one that killed that man. Then he said that John had gone to get him and that they was riding around looking for someone to rob. He saidthat they was riding around in that

neighborhood because they know that they be some rich people live around there. So they was riding and they seen the man getting out of his car. He said they had parked the car on Dryades and they was walking down Josephine when they seen the man parking his car. Kevin said that when they walked up on the man, he was giving them his stuff and he was begging for his life. So he said that he got scared cause John had the gun and I guess he knew that he was full of that stuff and didn't know what he was going to do. So he said he broke and ran across Baronne St to his car. He said that when he was opening his door, he heard the shots and he knew that it was Nut, so he just pulled off and left him. He said that he went to the Ram's and that Nut came there later, thats when it was so hot with the police all around and all. When Kevin ran off he had the wallet, and they was arguing because JOhn thought Kevin had take the money out of it. He just said that he panic and left him, and then Nut came around there and start talking about he got some money or something.

A couple of days after I talked to Kevin, John got out of jail, and I kinda turned it around on him and told him "hey man, why Kevin told me that you killed that man." He had been smoking them clickers and he was feeling loose. He said "Man, that nigger Kevin still running his mouth. I going to have to kill him, cause a few friends had told him to kill Kevin cause he was going to set him up. Then he said something like "I ain't going to take the charge by myself. Then he said that he had went and got Kevin and that they was riding around trying to find someone in that neighborhood to make some money off of. After they parked the

car he told Kevin that he know if they walk down that way that they got some people in them houses that are rich and all. He said that they was walking and they seen theman parking his car. Then he got out and they seen that he was in a suit and all and figured that he had some money. So he got him by the driveway, and he said that he had had the gun. So after he got the stuff, he said that the man grabbed the gun and it went off, and then he said that it kept going off, but I don't believe that. He all high and he know what he be doing, and you got to keep pulling it for it to go off. So then he told me that Kevin split on him and just left him there, and that he emptied the gun. So then he said that he got a watch and a ring, and the wallet that Kevin ran with. See when it had first started, he had handed Kevin the wallet, and Kevin ran off with it. Then he told me that he really didn't want to do it. Then he told me, "you see J.R., he don't know. He got everything and he don' t know what he got". Then he said that he know what he was doing and he was setting people up in case they bust J.R. he could say that other people sold him the stuff, and not him. Then John said that he was going to confront Kevin about telling people about it. John also told me that that the wallet was full of credit cards, and that it didn't have no money in it. He said that Kevin told him he went to the Ram's and went through it and then he went to throwing the credit cards and all.

So after that, if anyone said anything about the murder, they just didn't want to hear it. They didn't even want to see them posters about the reward, they wouldnt look at that. After that another little friend had told me that John was

going to kill Kevin on New Years Eve. But you see Kevin had went in early, he went inside because one of his other friends had mentioned it to him.

Q. Do you know what day John approached you to sell the gun.
A. It was about 4 or 5o'clock on a Sunday.

Q. Where did he meet you at.
A. I had gone to his house, and then we walked to the park by the bakery on Martin Luther King, and thats when he mentioned it.

Q. Who did you sell the gun to.
A. J.R.

Q. Do you know his real name or where he lives.
A. I don't know his name, I know where he lives, but I don't know the address.

Q. Where did you sell the gun to J.R. at.
A. In his house.

Q. How much did you get for the gun.
A. 75 dollars, some weed, and a bag of tea.

Q. Whats tea.
A. Something you snort.

Q. Can you describe the gun that you sold to J.R.
A. It was a big old black handgun with a brown handle, with a bull and the word Tauras on it. I think it were a .357 or a 45 or something.

Q. Was the gun loaded.
A. No it was empty. John had said that he had shot all the bullets out of it.

Q. Had you ever seen John with this gun before.
A. Yea I had seen him with the gun before. It was his gun, I ain't going to say he had papers on it or nothing

Q. What did you do with the money and drugs you got from J.R. for the gun.
A. I gave it all to him, I don't know what he did with it.

Q. When and where did you give John the money for the gun.
A. I met him in a walkway in the project, on Thalia St.

Q. How did you get to J.R. house.
A. We walked from the park to John's mother house to get the gun. She live way inthe back of the project. From there his mothers house we walked to J.R.'S

Q. Do you know if J.R. still has this gun.
A. Being that it was a new pretty gun, he still ought to have it.

Q. Do you know anything about the rest ofthe property that was taken during the robbery.
A. Well, John told me that J.R. got everything.

Q. Did you ever see the watch or the ring.
A. No. I had seen Kevin with a ring on his finger that he never had before, but I don't know if that's the ring.

Q. What did that ring look like.
A. The ring I seen was gold, and it had three or four big diamonds across the top.

Q. Where does John live.
A. He live with his grandmother at that address that I got onthe paper.

Q. What about Kevin.
A. He stay with his grandmother too on Felicity.

Q. Is this the paper you are talking about.
A. Yea.

Q. Who wrote the information on this paper.
A. Greg did.

Q. Who is Greg.
A. Greg Dawson.

Q. How did Greg come to write this information down.
A. I told him about it and he was writing it all down.

Q. Who's car did they use that night.
A. Kevins · :r.

Q. Can you describe it for me.
A. It is a burgundy Monte Carlo with a white vinyl top.

Q. Did either Kevin or John tell you where this robbery happened at.
A. Kevin told me on Baronne and Josephine . He told me that his car was parked by Katie's beauty salon on Josephine and Dryades.

Q. Did they describe the man that they robbed to you.
A. They just said that he was a white man and he was dressed nice in a suit.

Q. When did John first tell you about the robbery.
A. I don't know what day it was, but he had just gotten out of jail that morning, and he had slept by the house.

Q. Where were you when he told you that.
A. By the house. He couldn't sleep cause he was high, and while we were talking it flashed on TV.

Q. When did Kevin tell you about his involvement in the robbery.
A. John had just gone to jail, it was on a Thursday night at about 10:30.

Q. Where were you when he told you.
A. He was walking down by the His and Hers barroom.

Q. You mentioned "Nut" a couple of times in this statement. Who is Nut.
A. John Thompson.

Q. Can you tell me exactly what John and Kevin got from the man during the robbery.
A. Kevin had a wallet full of credit cards, and he had had the ring and the watch.

Q. Did anyone see them pulling the robbery.
A. They didn't tell me anyone saw them.

Q. Does Kevin go by any other names.
A. Kojak

Q. Did you ever notify the police and tell them what you knew.
A. No, I had told Greg and he called Crimestoppers and told them.

Q. Did you approach anyone else and tell them what you knew.
A. I told my mother, and Angie, I asked her to contact Mr. Liuzza so I could tell him cause I couldn't go the police right away.

Q. Why did you decide to tell the police what you knew.
A. I had known Mr. Liuzza's son I lived across the street, and thats where I knew Angie from. She been staying there a long time. So I had took sick after I really heard about and I would see it on TV and I couldn't sleep. My daddy been in jail for 16 years, and I just couldn't see why these killers couldn't be in jail.

Q. Did you meet with Mr. Liuzza and tell him.
A. Yea. I had come to the hotel a couple of times but I couldn't get the nerve. One time I asked one of the employees and he said that his car wasn't there. So then later I came down with Greg and talked to Mr. Liuzza.

Q. Did anyone force you to give this statement.
A. Ain't nobody forced me.

Q. Did you give this statement of your own free will.
A. Yea.

Q. Is the information you have provided true and correct to the best of your knowledge.
A. Yea.

Q. Is there anything you wish to add or delete from this statement.
A. NO, thats all.

This statement was taken by Det Donald Curole at the International Hotel 300 Canal St, Room 428, on Wednesday January 16, 1985 in the presence of Det Marco Demm a, Mr. Bill Brown, and Mr. Gregory Dawson. Statement completed at 3:53PM.

/s/ Gregory Dawson 1-16-85
Gregory Dawson

/s/ Bill Brown 1/16/85
Bill Brown

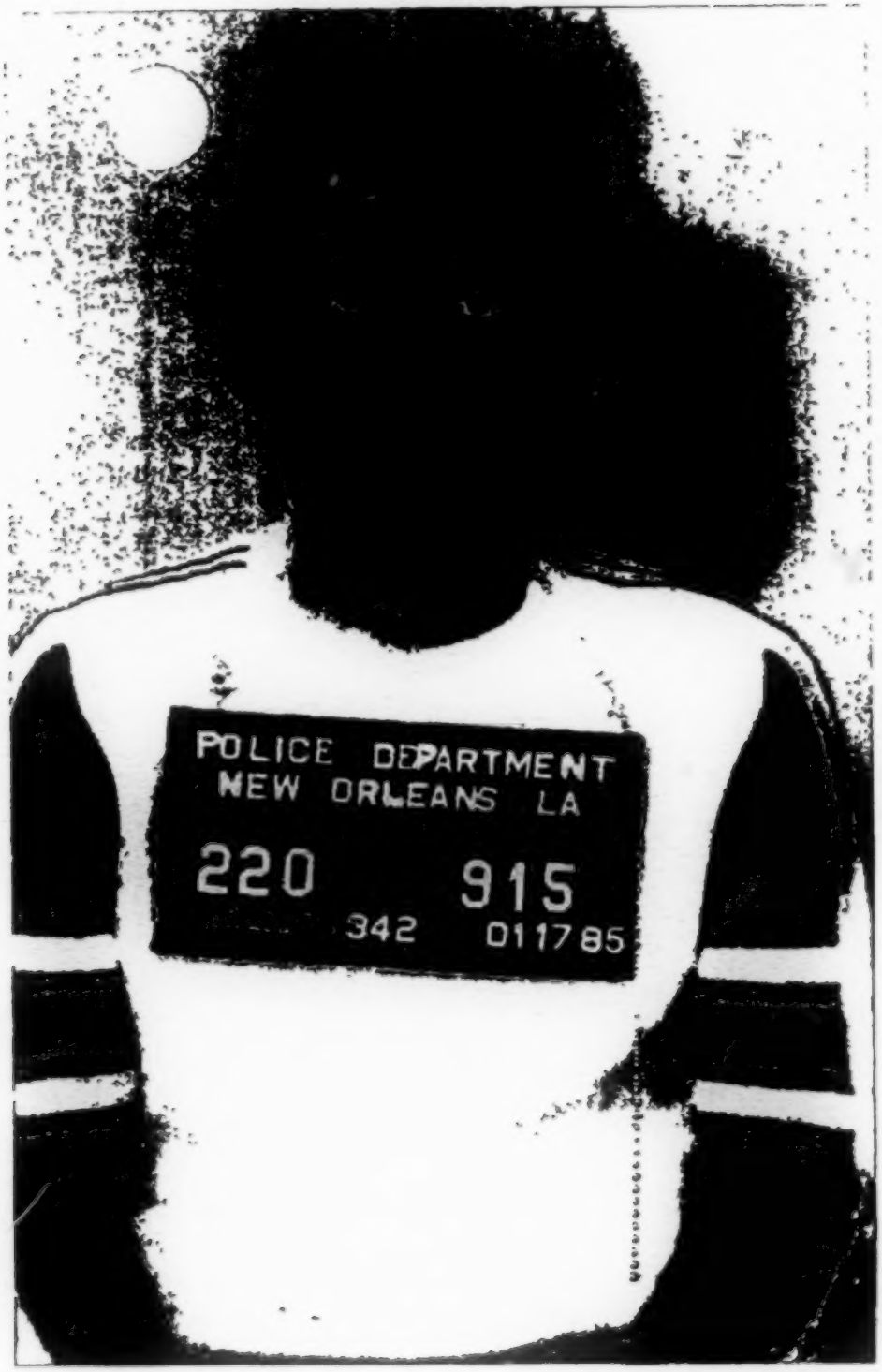
1-16-85
/s/ Richard Perkins
Richard Perkins

/s/ Marco Demma
Marco Demma

/s/ Donald [ ] Curole
Donald Curole

JA 597

TRIAL EXHIBIT #25



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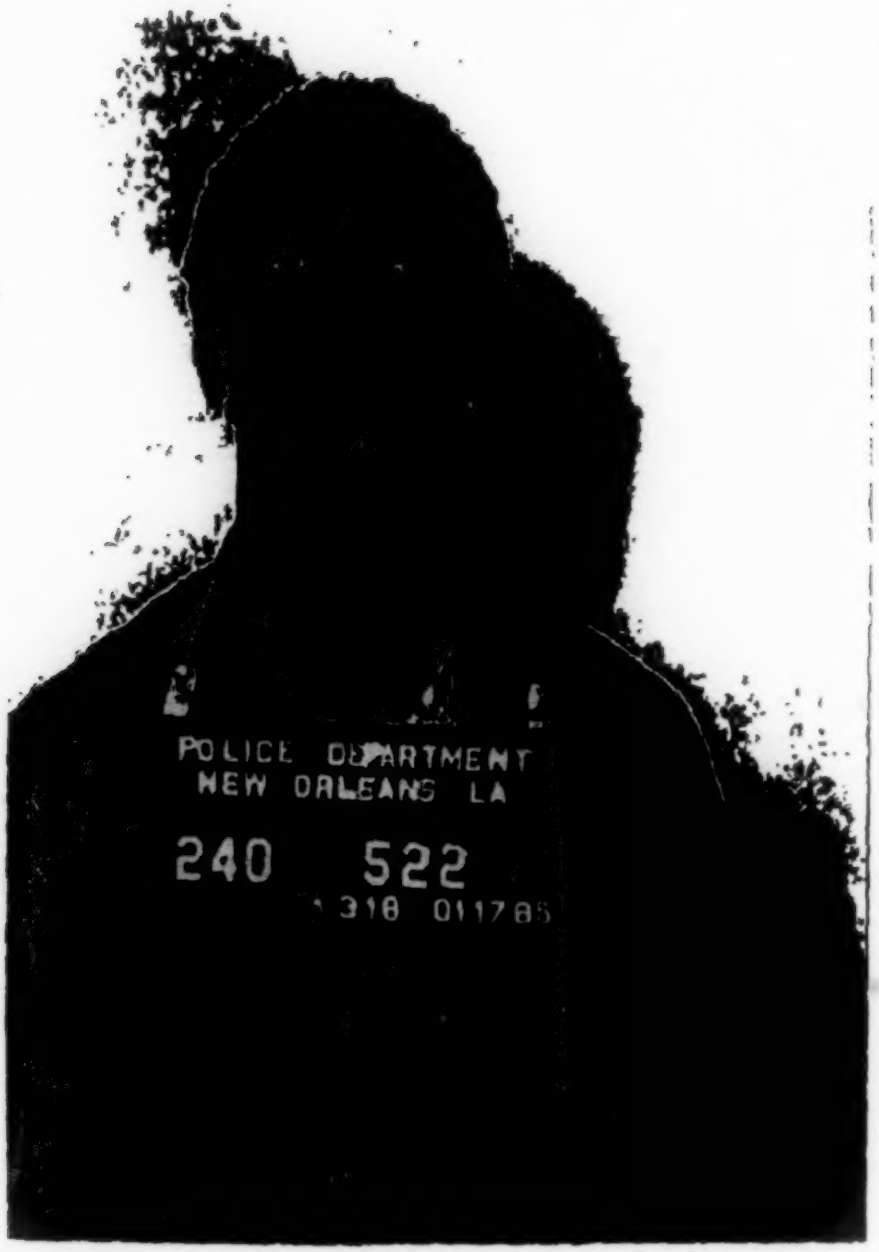
JA 598

TRIAL EXHIBIT #26



JA 599

TRIAL EXHIBIT #30

New Orleans Police Department Supplemental Incident Report by Detective Donald J. Curole

[Partial Fold-out Exhibit, see next 2 pages]

NOPD SIGNAL 30	NEW ORLEANS POLICE DEPARTMENT UNIFORM MOTOR VEHICLE TRAFFIC ACCIDENT REPORT AND INCIDENT REPORT CONTINUATION SHEET	SUPP STATE COMPUTER NUMBER
PAGE 3 OF 35		NOPD ITEM NUMBER L-5484-84

SEQ	QUANTITY	DESCRIPTION	SERIAL NO.	TYPE	STOLEN	RECOVERED

VICTIM: Ray T. Liuzza, WM, [redacted]-50, formally residing [redacted]

LOCATION: 1745 Josephine St., on the sidewalk

TIME & DATE: Thursday, December 6, 1984 at 12:40 AM

PROPERTY STOLEN:

a. 1- Cartier Tank Watch, Model # 837-17723, small square white face with roman numerals, blue sapphire stone on stem, black leather band, value $1,800.00 dollars.

		b. 1- Men's gold block ring with the initial "L", Value $100.00 dollars c. 1- Sterling Silver chain, no further description. Value unknown. d. 1- Man's black leather wallet, Value unknown e. 1- American Express Credit Card, Account [redacted] f. 1- Shell Oil Company credit card, Account Number [redacted] g. 1- Texaco Oil Company credit card, Account Number [redacted] h. 1- Saks Fifth Ave. credit card in the name of Ray Liuzza, Account number unknown.
	PROPERTY RECOVERED:	a. 1- Man's gold block ring with the initial "L", value $100.00 dollars
	EVIDENCE :	A. 1- Tauras .357 magnum

	caliber revolver, blue steel 4" barrel, brown wooden grips, Serial # 11387. B. 2- Maywell C-120 Cassette Tapes C. 2- spent pellets recovered from scene D. 1- Gold block ring with the initial "L" E. 1- Large square white piece of cardboard on which is recorded Perkins original notes.
PAGE 4 OF 35	
	F. 2- Crimestoppers reports identifying the perpetrators. G. 6- BI photographs used in the lineup of John Thompson H. BI photographs used in the lineup of Kevin Freeman I. BI photographs of Richard Perkins used in identification. J. 1- pair of men's grey pin striped slacks containing

blood stains and bullet holes

K. 1- 1974 Chevrolet Monte Carlo 2dr, license 53B957

WITNESSES:

1. Junior Harris, NM, [redacted]-48, residing [redacted], Phone [redacted]

2. Jessie Lee Harrison, NM, [redacted]-60, residing [redacted], phone [redacted]

3. Ronnie Grant, NM, [redacted]-59, residing [redacted]

4. Kenneth Patrick Carr, NM, [redacted]-60, residing [redacted], phone [redacted], Employed 721 Iberville St., Phone [redacted]

5. Richard Alphonse Perkins, NM, [redacted]-64, residing [redacted], PHone [redacted]

6. William Brown, WM, Asst. General Manager, International Hotel, 300 Canal St., 581-1300

7. Ray A. Liuzza, WM,

President, International Hotel, 561-1300

8. Gregory Dawson, NM, Metropolitan Insurance Company, 2714 Canal St., Suite 500, Office phone 822-3561, Home phone [redacted]

9. Evangelina "Angie" Poisson, WF, [redacted]-10, residing [redacted], phone [redacted]

10. Paul Schliffka, WM, [redacted]-62, residing [redacted], phone [redacted]

11. Pamela Staab, WF, [redacted]-62, residing [redacted]

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12. Nora Mestayer, WF, [redacted]-61, residing [redacted], phone [redacted], employed 929 Howard Ave., phone 586-9303

13. Jody Beauregard, WF, [redacted]-56, residing [redacted], phone

[redacted], employed Baptist Hospital.

14. Susan Steiner, WF, [redacted]-57, residing [redacted], home phone [redacted], Office phone 525-1512

15. Pierre Villere, WM, [redacted]-52, residing [redacted], Home phone [redacted], Office phone 566-1440.

16. Frank Maceilli, WM, [redacted], phone [redacted]

17. Patti Pulitzer , WF, [redacted]-43, residing [redacted], home phone [redacted], Office phone 569-9315.

PROPERTY:

a. 1- Colt D.A. .38 caliber revolver, blue steel, 6" barrel, brown wooden handles, Serial # K-5464

b. 1- Dan Wesson .357 caliber revolver, blue steel, 6" barrel, brown wooden handles, Serial # 210485

c. 1-Colt super .38 caliber automatic, blue steel, Serial # 90812.

ARRESTED SUBJECTS:

1. John Thompson, NM, [redacted]-62, residing [redacted], BI # 220-915

2. Kevin Freeman, NM, [redacted]-64, residing [redacted], BI # 240-522

GIST:

During the early morning hours of Thursday, December 6, 1984, the two arrested subjects, John Thompson and Kevin Freeman, were cruising the St . Charles Ave. area in Freeman's 1974 Chevrolet Monto Carlo with the intention of locating and robbing a wealthy resident. Shortly after midnight, Freeman parked his vehicle at the intersection of Dryades and Josephine, and the two alighted from the vehicle and began walking down Josephine St., toward St. Charles Ave. Upon reaching the intersection of Baronne St. and Josephine, Thompson and Freeman observed the victim, Ray T. Liuzza, parking his silver BMW automobile across the street from his apartment complex in the 1700 block of Josephine St. As Thompson and Freeman continued their trek, Ray Liuzza got out of his vehicle and

walked across Josephine St., toward the rear gate of his complex. As Ray Liuzza approached the gate, Thompson pulled a Tauras .357 magnum blue steel revolver and walked up to

Liuzza. Thompson pointed the weapon at Liuzza and ordered him to relinquish his property. Mr. Liuzza submitted to the robbery and peacefully supplied Thompson with his wallet, his wristwatch, and his gold initial ring. As he handed over each article, Mr. Liuzza pleaded with Thompson not to shoot him. At some point during these actions, Kevin Freeman became freightened and fled the scene, running back to his vehicle. Just as he reached his Chevrolet, Freeman heard a volley of shots fired from the location of the robbery. A short time later, Freeman spoke with John Thompson who informed him that he had completed the robbery by shooting the victim. Freeman verified the occurance via media accounts of the incident. Articlws of property stolen in the robbery were later sold by Thompson to a buyer, from whom it was recovered by police during an investigation.

NARRATIVE:

Det. Donald James Curole, assigned to Car 3345 of the Homicide Division, respectfully reports of receiving notification from Det. Cyril Davillier on Thursday, December 6, 1984 at 1:30 AM, that members of the Sixth District were investigating an Armed Robbery, which occured in the 1700 block of Josephine St, in which the victim was shot and seriously wounded. Det. Davillier further advised Det. Curole that investigating officers of the Sixth District had completed the initial scene investigation and had transported the victim to the Accident Room

at Charity Hospital.

At 1:42 AM, Det. Curole arrived at the Accident Room of Charity Hospital where he met with Det. Cyril Davillier. The Dets. then interviewed Head Nurse Susan Cummings, who advised that the victim had already been transported to surgery, and was now listed in critical condition with multiple gunshot wounds. Both physicians who initially treated the victim were in surgery with him, and were unavailable for interview. Miss. Cummings provided no further information on the condition of the victim at this time.

At 2:15 AM, Dets. Donald Curole and Cyril Davillier met with Officers Clyde Angelo and David Carter, assigned to Car 612 of the Sixthe District, who had conducted the initial scene investigation. These officers stated that on Thursday, December 6, 1984 at 12:43 AM, they responded to an emergency broadcast of a shooting from 2103 Baronne St. Upon arrival, at 12:44 AM, Officers Angelo and Carter observed the victim, later identified as Ray T. Liuzza, WM, [redacted]-50, lying in the grass next to the building at 1745 Josephine St., near the intersection of Baronne St. Mr. Liuzza was conscious when the officers located him, and briefly told them that he had been robbed, and that the robber told him he was going to shoot him. Mr. Liuzza then refused to provide the officers with further details of the incident, instead insisting that they transport him to

the incident, instead insisting that they transport him to the hospital in their patrol car.

At 12:48 AM, Unit 1806, manned by Emergency Medical Tech's Riggs and Daggs, arrived on the scene and administered first aid to the victim. A 12:55 AM, the EMT's placed Mr. Liuzza in the rear of their unit and transported him to the Accident Room of Charity Hospital for treatment. Officers Angelo and Carter were unsure of the number, or severity of the injuries, but believed that Mr. Liuzza had suffered multiple gunshot wounds to the chest and back.

At 1:46 AM, Crime Scene Tech. Anthony Cusimano arrived on the scene and took the necessary photographs. Tech. Cusimano then retrieved two spent pellets, one of which penetrated the exterior wall of 1745 Josephine St, and the other which lodged in an interior hallway wall of the apartment at that address. This pellet had originally passed through the wooden entrance door before lodging in the hallway wall. A third pellet, which had also penetrated the exterior wall of 1745 Josephine St., could not be located. A detailed search of the area was conducted for additional evidence, but none was located. Tech. Cusimano later prepared a detailed report outlining his activities on the scene and itemizing the evidence collected. A copy of this report is now contained in the case file and is available for future reference.

Upon completion of these tasks, Officers Angelo and Carter began interviewing residents of the neighborhood in an attempt to locate witnesses to the incident. The officers first interviewed Mr. Paul Schliffka WM, [redacted]-62, residing [redacted] Mr. Schliffka told Officers Angelo and Carter that at approximately 12:40 AM, as he was getting into his vehicle, which was parked in front of his residence at 2026 Baronne St., he heard what sounded like several gunshots being fired around the corner of Josephine St. Upon looking up, Mr. Schliffka observed an unknown negro male running on Josephine, across Baronne st., in the direction of Dryades St. As the wanted subject ran across Baronne St., Mr. Schliffka could plainly see a dark colored long barreled revolver still clenched in his right hand. After the subject passed, Mr. Schliffka ran to the corner of Josephine and Baronne Sts. and watched the subject as he fled up Josephine to Dryades, and then unknown. Mr. Schliffka's attention was then drawn away from the fleeing suspect by the moans of Mr. Liuzza, who was lying wounded a few feet away in the grass. Druing an interview, Mr. Schliffka provided Officers Carter and Angelo with the following description of the suspect: Negro male, unknown age, 6' tall, slim build, dark complexion, close cut black har, wearing a black jacket and blue jeans. This subject was armed with a large, blue steel revolver, with a long barrel, which he held in his right hand. This description was later broadcast by Officers Angelo and Carter to all units patroling the area.

* * *

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Miss Staab stated that from the sound of the voices, she believed that the robbery occured just outside her bedroom window. Miss Staab continued that she distinctly heard the voice of her neighbor, Ray T. Liuzza, saying rather excitedly "Please go ahead, take my watch", and "here you can have my wallet". Miss Staab described Liuzza as "very insistent" in telling the person to take his property. She then heard another man's voice, whom she did not recognize, say "I've got to shoot you", or words to that affect. She then heard a volley of shots fired in rapid succession, but was unsure of the exact amount fired. Miss Staab then heard what sounded like someone running, but was unsure of which direction. After hearing this sequence of events. Miss Staab got out of bed and ran to her roommate, identified as Nora Mestayer, who was sleeping in her bedroom located in the rear of the apartment. When she reached her roommate she exclaimed "someone had just shot Ray". Later, during the scene investigation, officers entered her apartment and located a spent pellet, which was ledged in her bedroom wall, just above where her head was positioned as she slept. No further information was collected from Miss Staab during this interview. It should be noted that Miss Staab never observed the incident, and was unable to provide the investigators with any information pertaining to the wanted subject.

At 11AM, Det. Curole arrived at [redacted], where he met and interviewed Miss Nora Mestayer, WF, [redacted]-61. Miss Mestayer, who is Miss Staab's roommate, stated that she also was awaken by the sound of loud voices outside of her apartment, but was unable to understand what was being said. Shortly thereafter she heard a rapid series of shots fired, followed by the sound of someone running. Miss Mestayer stated immediately after that Miss Staab entered her room and informed her that Ray Liuzza had been shot. Miss Mestayer could add nothing further during this interview.

At 11:30 AM, Det. Curole met and interviewed Mr. Paul Schliffka, WM, [redacted]-62, at his residence at [redacted] Mr. Schliffka stated that he had just walked from his apartment and was in the process of entering his vehicle, which was parked at the curb, when he heard four shots fired around the corner on Josephine St. Upon looking up Mr. Schliffka observed a negro male subject running across Baronne St., and then continuing down Josephine St. toward Dryades St. As this man crossed Baronne St., Mrs. Schliffka plainly observed a large, blue steel, long barreled revolver still clenched in his right hand. Mr. Schliffka described this man as a negro male, early 20's 6' tall, slim build, dark complexion, close cut hair, wearing a black nylon jacket and dark pants, possibly blue jeans. Mr. Schliffka saw this man only from the side for a short period of time as he ran across Baronne St., and was unsure if he could recognize his again. After

seeing this man run across Baronne St., Mr. Schliffka walked to the corner of Josephine and Baronne and watched as the perpetrator ran up the sidewalk, on the downtown side of Josephine St., toward Dryades. Mr. Schliffka's attention was drawn away from the suspect when he became aware ofsomeone moaning behind him.

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He then turned around and found Mr. Liuzza lying in the grass a short distance away. Upon realizing that Mr. Liuzza was seriously wounded, Mr. Shcliffka ran to the front of his apartment and yelled for his roommate to notify the police, which she did. Mr. Schliffka had no further information to contribute to this investigation.

At 3PM, Friday, December 7, 1984, Det. Donald Curole proceeded to the International Hotel, 300 Canal St., where he met and interviewed Mr. Bill Brown, Asst. General Manager, and Mr. Ay A. Liuzza, who is the father of the victim and President of the Hotel. The two men supplied Det. Curole with background information on the victim, as well as the identity of close firends who could possibly contribute useful information. Mr. Liuzza also proivded Det. curole with a description of the property he believed was stolen from his son during the robbery. This list included a Cartier Tank wristwatch, small square white face with gold trim and black numerals, a gold block style ring with the initial "L", a sterling silver chain which he wore around his neck, a black leather

wallet containing an American Express Credit Card, a Saks Fifth Avenue Credit card, all in the name of the victim, and a Shell Gasoline Credit Card in the name of the International Hotel. Mr. Liuzza also suggested that Det. Curole contact Mr. Scheffer Michaels at Adler's Jeweler's on St., for additional information on the wrist watch. Mr. Michael's sold the watch to the victim some years ago and maintained records on all transactions.

Mr. Liuzza went onto say that his son had been empolyed at the Hotel for about five years, and had just been promoted to Vice President of the Hotel a week prior to his death. Ray T. Liuzza was close friends with Mr. Frank Macelli, who owned and operated the apartment complex on Baronne St., where he lived for the past five to six years. Mr. Liuzza had no recollection of his son encountering any problems at his residence during the time he resided there. Mr. Liuzza described his son as a gentle man who would have submitted to a robbery attempt without expressing hostility or resistence. Mr. Liuzza had nothing further to add during this conversation.

On Saturday, December 8, 1984 between the hours of 12 noon and 4PM, Dets. Curole and Demma conducted a supplemental canvass of the area surrounding the scene. During this canvass, the following people were interviewed:

Miss Sheri Hartman, WF, [redacted]-49, [redacted] Heard six gunshots which prompted

her to look out of her second floor window. Upon doing so she observed a blonde haired male kneeling over a man who was lying in the grass next to the corner of the building. No further information.

Mr. Logas Faust, WM, [redacted]-62, [redacted] Heard six shots fired during the night, but saw nothing.

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Miss Angie Poisson, WF, [redacted]-10, [redacted] Miss Poisson identified herself as the manager of the apartment complex, but had no independent knowledge of the shooting.

Susan Crane, WF, [redacted]-58, residing [redacted] Heard several gunshots fired at about 12:40 AM, but heard, nor saw nothing else.

Stephen McAlister, WM, 33, [redacted] Heard what he believed to be gunshots fired early that morning. Went to his window but saw only the victim lying in the grass.

Rosemary Cash, WF, 24, [redacted], [redacted] Was awaken by the sound of six gunshots, then heard someone yelllng "No, No". Neither heard nor saw anything else.

Miss Sharon Robinson, NF, 39, [redacted] Heard five shots fired at about 12:50 AM. Neither heard nor saw anything

further.

At 6PM, Saturday, December 8, 1984, Dets. Curole and Demma again met with Mr. Bill Brown at the International Hotel. Mr. Brown informed the Dets. that he had collected the victims clothing from Charity Hospital shortly after his death, and now wished to turn that clothing over to the investigators. Mr. Borwn then handed Det. Curole a brown paper bag containing Mr. Liuzza's underwear, a pair of black socks, and a pair of grey pin stripped patns which contained bullet holes and blood stains. Mr. Brown further advised Det. Curole that he had located Mr. Liuzza's religious medan in the property and had turned it over to the family. Again he mentioned that the sterling silver chain on which this midal was once attached, was still missing. Nothing further was learned during this interview.

At 8PM, Dets. Curole and Demma proceeded to the Property and Evidence Division where they turned over one pair of grey pin stripped pants containing bullet holes and blood stains over to Officer R. Huber. Receipt control number A74293 was issued for this evidence. A copy of this document is now contained in the case file.

On Sunday, December 9, 1984, at 4PM, Det. Curole interviewed Miss Patti Pulitzer, WF, [redacted]-43, residing [redacted] Miss Pultzer identified herself as a close friend of the victim and informed the investigators that she was with Pierre Villere, along with Ray Liuzza and

his girlfriend, Susan Steiner at Lenfant's prior to the murder. Miss Pulitzer stated that Liuzza left Lenfant's with Miss Steiner at about midnight. Just prior to leaving, Mr. Liuzza mentioned that he was fatigued, and intended to proceed straight home. Miss Pultizer concluded the interview by saying that Mr. Liuzza consumed only a small amount of alcohol during his stay at Lenfant's and was not intoxicated at the time he left .

* * *

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valuable background information on the victim. Miss Beauregard also indicated that she was capable of rendering an artists conception of the gold block ring taken from Mr. Liuzza during the robbery. Before concluding this interview, Det. Curole made arrangements for an artists to meet with Miss Beauregard.

At 9PM, Monday, December 10, 1984, Det. Sam Gebbia of the Homicide Division met with Miss Jody Beauregard at the residence of Miss Patti Pultzer, [redacted] As a result of this meeting, Det. Gebbia was able to prepare a sketch of the ring Mr. Liuzza wore at the time of the robbery. A copy of this sketch is now contained in the case file.

On Tuesday, December 11, 1984, Mr. Ray A. Liuzza held a news conference during which he informed the media of the existance of a reward fund, totaling $15,000.00 dollars, which had been posted for the arrest and convictions of the

murdered of Ray T. Liuzza. The provisions of this fund stipulated that half the amount would be awarded to the person or persons who provided information leading to the arrest of the person responsible, with the remaining half awarded at the time of this persons conviction. This fund was to be administered by Mr. Joseph Maselli Jr., Attorney at Law, who is also a close friend of the family. A notarized copy of the document listing the amount of the reward, and the terms by which it would be administered, is now contained in the case file and is available for future reference.

Following this news release, posters announcing the reward were prepared and distributed in the area of the murder. Articles concerning this reward fund were published in the local newspapers, and stories aired by local radio and television stations. In hppe of soliciting the information which would identify whomever was responsible for this crime.

On December 12, 1984, Det. Curole contacted and interviewed the three people who notified police of the incident on the night the murder occured. The first person interviewed was Miss Kanpice Oholendt, WF, [redacted]-45, who is the roommate of Paul Schliffka. Miss Oholendt stated that she was in the front room of her apartment when she heard a gunshot, and then a pause followed by three additional gunshots. She then stepped onto her balcony, which overlooks Baronne St., at which time she observed a black male, 25 years of age, medium

build, dark jacket, dark pants, running across Baronne St., carrying a gun in his right hand. Following this, Paul Schliffka yelled to her that someone had been shot, and ordered her to call the police, which she did. Miss Oholendt informed the investigators that she only saw the fleeing suspect from the rear, and would be unable to identify him.

Dets. next interviewed Miss Charon Kiehl, WF, [redacted]-54, residing 2103 Baronne St., Apt. 5., Miss Kiehl stated that she was in her kitchen when she heard five gunshots fired in rapid succession. She then ran to her bedroom window and peered out, observing a tall slim black man with a

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hair net on bending over a man's body. Since this interview was conducted Miss Kiehl has spoken to Paul Schliffka, and now believes that it was he she boserved kneeling over the body.

The third complaninant, Miss Rosemary Cash, had been interviewed earlier in this investigation with the information collected recorded in a prior portion of this report.

During the course of this investigation, Dets. assigned to the Criminal Investigation Bureau of the New Orleans Police Department received and recorded a vast amount of information identifying a myriad of suspects in the murder of Ray T. Liuzza. Additional information was received from other law enforcement agencies as

well as the friends and family of the victim. Most of this information was received from people who telephoned the authorities with their information, but expressed a wish to remain anonymous. Some information was collected from people who identified themselves and cooperated in the ongoing investigation. In each case where information identifying a certain suspect was received, an investigation was conducted to ascertain that persons culpability in this matter. It should be noted that none of these investigations resulted in the identification of Ray Liuzza's killer, and most resulted in the elimination of the person named as a suspect in this crime. The perponderance the scope of this report, and therefore not included. However, this information was recorded, and retained for future reference should this be required.

Two pieces of information obtained via the Crimestoppers Hotline duirng this investigation ultimately assisted the investigators in identifying the killer's of Ray T. Liuzza.

The first tip was received on the Crimestopper's Hotline by Det. Vivian Williams on Monday, December 31, 1984 at 10:30 AM. This caller, a black male who remained anonymous, identified John Thompson, NM, 23, alais "nut", residing [redacted], and Kevin Freeman, Nm, 23, alais Kojak, residing [redacted] as the people involved in this killing. The caller described Thompson as a negro male, 23 years old, 6' tall, 130 lbs with

short black hair, and Freman as a negro male, 23 years old, years old, 6' tall, 130 lbs. The claler further stated that Thompson actually robbed and shot Liuzza while Freeman waited in the vehicle, described as a 1975 or 1976 Chevrolet 2 door, black over burgundy. The caller who provided no additional information, was assigned identification number # 292, and the information recorded on a Crimestoppers questionnaire, which was forwarded to Det. Curole for investigation.

The second tip was also received via the Crimestopper's Hotline by Det. Williams on Friday, January 4, 1985 at 2:55 PM. This caller, who identified himself as Ken Carr, residing [redacted]

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told Det. Williams that while seated in a bar located at Felicity and Saratoga, on 12-31-84, he overheard a conversation between two men who were seated next to him. One of the men, whom he identified as John, alias "NUT" or "NOOKIE", NM, 6' tall, 120 lbs. was heard to say he didn't want to kill him, but he was about to turn me over. The second man then said "John, don't crack on me". Mr. Carr provided no further information, but stated he would arrive home from work at 4:30 PM and requested an interview with the detectives investigating this case. Det. Williams assigned identification number #295 to Mr. Carr, and then recorded the information on a Crimestoppers Questionnair which she forwarded to Det. Curole for

investigation.

It should be noted that original copies of these questionnaires are now contained in the case file and are available for future reference.

At 5:30 PM, Friday, January 4, 1985, Dets. Curole and Demma proceeded t o 1540 St. Mary, Apt. A, where they met and interviewed Mr. Kenneth Patrick Carr, NM, [redacted]-60. Mr. Carr, who is employed at Sallara's Parking Garage, 721 Iberville St., told the investigators that while seated in Harry's Bar, located at Felicity and Saratoga, at about 1:30 AM, January 1, 1985, he overheard a conversation between two men who were seated near him. The initial portion of this conversation was inaudible but then he heard one man say to the other "why did you shoot him". The second man then repolied "Man, I didn't know the man's people had that kind of money, and there is a big reward out". He then mentioned that he had to kill the victim because he attempted to overpower him. The first man then remarked that he knew there was a lot of heat on the street, but to keep cool, and not to crack on him. Mr. Carr then asked someone in the bar if they knew the man, and they replied that his name was Nookie. Later Mr. Carr learned that his real name was John. According to Mr. Carr he had never met this man, and hadn't seen him before that night in the bar. Mr. Carr also did not recongize the man that "John" was speaking to. Before leaving the bar, Mr. Carr observed another man approach John and speak to him for a few minutes. At the

end of this conversation the man stepped back and shouted "Hey man, don't fuck with me. I know what you did". Mr. Carr did not know the identity of the man that shouted, or the man that "John had spoken with earlier. Mr. Carr described John as "real uptight and nervous" during these conversations. Before ending this interview, Dets. Curole and Demma made arrangements for Mr. Carr to render a formal statement of his knowledge.

Following this interview, Dets. Curole and Demma searched through accumulated information received via the Crimestopper's hotline, and located the questionnaire identifying John Thompson and Kevin Freeman as the perpetrators. Dets. Curole and Demma then checked both names through the Motion Computer System and located a criminal hostory on a John Thompson, NM, [redacted]-62, residing at the stated address of [redacted]

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This record listed a previously utilized moniker of "NUE', and reflected previous arrests for three counts of narcotics violations, two counts of battery, and one count each of receiving stolen property, resisting arrest, and illegally carrying weapons, in additon to numerous traffic charges.

A criminal record located on Kevin Freeman, NM, [redacted]-64, residing [redacted], listed a known moniker of "Kojak", which coincided with the information received. This record reflected previous arrests for possession of stolen property

and illegal carrying of weapons. A print-out of both criminal records are now contained in the case file.

Following this Dets. Curole and Demma proceeded to the Criminal Recores Division where they obtained a photograph of both John Thompson and Kevin Freeman. Upon returing to the Homicide Office, the investigators prepared two photographic lineup consisting of the following photographs:

1. BI# 139-798
2. BI# 251-229
3. BI# 204-237
4. BI# 220-915 (suspect John Thompson)
5. BI# 207-464
6. BI# 235-779

1. BI# 211-106
2. BI# 220-791
3. BI# 238-676
4. BI# 237-383
5. BI# 240-522 (suspect Kevin Freeman)
6. BI# 227-894

On Sunday, January 6, 1985 at 9:07 PM, Mr. Kenneth Carr arrived in the Homicide Office and rendered a typewritten statment which contained all of the information alluded to previously. During the course of this statement, at 9:32 PM, Det. Curole allowed Mr. Carr to view seperately each of the previously prepared photographic lineups. After carefully viewing each photo of the first lineup Mr. Carr

	tentatively identified the photo of John Thompson as the man he observed in the bar making statements he believed were connected with the murder of Ray Liuzza. Mr. Carr then signed and dated the rear of the photograph he identified, and initialed and dated the remaining photographs. Mr. Carr was then allowed to view the second lineup containg a photograph of Kevin Frreman, but after carefully viewing each photograph was unable to recognize anyone. Upon completion of this statement the lineup containing the photo of John Thompson was marked as evidence, and both photographic lineups were retained in the case file for further use. An original copy of Mr. Carr's signed statement is also contained in the case file and is available for future reference.
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	On Sunday, January 13, 1985 at 4:30 PM, Det. Ronald Brink of the Homicide Division received a telephone call from Mr. Frank Maselli, who is the owner of the property where Mr. Liuzza resided. Mr. Maselli told Det. Brink that at about 4PM, Sunday, January 13, 1985, a negro male subject was observed attempted to enter a locked iron gate in front of the apartment complex where Liuzza resided. The manager of the apartment complex, Angie Poisson, opened her front door after hearing the iron gate rattling and asked the negro male who he was looking for, The man replied "Angie, I'm looking for you". The subject then informed Miss Poisson that he knew who killed Liuzza and wanted to tell the family what he knew.

Following this conversation, Miss Poisson telephoned Mr. Maselli, who subsequently related the information to Det. Brink. After speaking to Mr. Maselli, Det. Brink contacted Det. Demma and informed him of the conversation.

At 4:40 PM, Det. Demma telephoned Angie Poisson who related the following information. At about 4PM Miss Poisson heard someone rattling the iron gate outside her apartment. Miss Poisson opened the front door of her apartment and found a negro male subject attempting to open the iron gate leading to the complex. She then asked the negro male who he was looking for and he replied "I'm looking for you Angie". Miss Poisson told Det. Demma that she did know this man, but was not surprised because many people in that neighborhood know of her. The subject told Miss Poisson that he knew who killed Ray Liuza. He told Miss Poisson that he was scared and could not stand outside for long, for fear he might be seen talking to her. He then asked Miss Poisson if she knew how to get in touch with Liuzza's family because he wanted to tell them personally who the killer was. Miss Poisson promised to get in touch with Liuzza's family, and then gave the negro male her phone number and asked him to call her back, Afterthis, the negro male left. Det. Demma then advised Miss Poisson to contact him the moment this man telephoned her.

At 6PM Miss Poisson contacted Det. Demma and informed him that the man had telephoned

her at about 5:20 PM. Duirng this conversation the man advised Miss Poisson that he knew the identify of the two men that murdered Liuzza, and that both men lived in the area. The caller went onto say that both subjects robbed Mr. Liuzza, and that during the robbery one of the men shot the victim. When the first man startting shooting, the other robber fled the scene on foot. The caller then informed Miss Poisson that the man that shot Liuzza stold his wallet, which contained several credit cards but no money, a watch, and a ring. He continued that the man that shot Liuzza was now planning to kill his accomplice because he was afraid he would talk. This killing was scheduled to occur on New Years Eve., but for some unknown reason it did not take place.

While Miss Poisson was talking with the negro male a negro female picked up the phone and identified herself as the mother of the caller.

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This woman told Miss Poisson that her son was telling the truth about the murder of Liuzza. This woman indicated that her son was very scared because the person responsible for the murder knew her son would be able to identify them. The information he possessed had caused the woman's son to take ill, and prevented him from eating or sleephing. Becuase he was uncomfortable with this information, he ultimately decided to tell Liuzza's family what he knew. Miss Poisson then asked the man why he didn't want to give this information to the

police investigating the incident. He replied that he had spoken to Homicide Detectives, but they believed he was only interested in the reward and was not telling the truth. He then advised Miss Poisson that he would call back to ascertain if she had arranged ameeting for him with Liuzza's family. He then hung up.

On Monday, January 14 , 1985 at 11:58 AM, Miss Poisson again contacted Det. Demma and informed him that she was again contacted by the negro male at approximately 11:50 AM. During this telephone conversation the caller informed Miss Poisson that he intended to meet with Mr. Liuzza's family at the International Hotel at 4PM this date. He then told Miss Poisson that he would call again at 1PM to confirm this meeting.

At 1PM the negro male again telephoned Miss Poisson and was informed that the meeting he requested had been arranged. He then informed her that he would go to the front desk at the hotel and ask for Mr. Liuzza. During these conversations the subject repeatedly voiced his concern that Miss Poisson would notify the police, who would be waiting for him at the hotel. Before concluding the conversation he again asked Miss Poisson not to call the police on him.

Following this, Dets. Curole and Demma contacted Mr. Bill Brown at the International Hotel and advised him of the situation. Following this briefing, Mr. Brown agreed to

meet with this subject in place of Mr. Liuzza, Mr. Brown also agreed to have a recording device installed in the office where the meeting was to take place, and to wear an electronic surveillacne device which would allow the investigators to monitor the conversation.

At 3PM, Dets. Donald Curole and Marco Demma, in company with Det. Charles Folmer, met with Mr. Bill Brown at the International Hotel. during this time Mr. Brown was equipped with the electronic surveillance device, and the office, where the meeting was to occur, equipped with a cassette tape recorder.

At 4:20 PM, Mr. Brown was advised by personnel at the front desk that a man was now in the lobby asking to see Mr. Liuzza. Mr. Brown then proceeded to the lobby and escorted this man to Mr. Liuzza's office. Once inside, Mr. Brown informed the man, who refused to identify himself, that Mr. Liuzza was unavailable at this time and had requested that Mr. Brown speak with him.

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The man, later identified as Richard Perkins, Alais "FUNK" agreed to this arrangement and began telling Mr. Brown that two firends of his were involved in the robbery, but only one shot Mr. Liuzza. He then stated that these two people told him of the incident, and would kill him if they found out he was telling someone what he knew. He also mentioned that the triggerman intended to shoot his accomplice

because he left him alone during the commission of the robbery.

Perkins said the two men, whom he refused to name, attempted to set him up, but did not elaborate. He further stated that they also set up another friend by selling him the gun used in the killing, along with the ring and watch that were taken during the robbery. He told Mr. Brown that the perpetrators did not get any money, and ultimately sold the property to acquire cash. He identified the peroperty stolen as a ring, a watch, and a wallet that contained four credit cards, but no money.

Perkins dewcribed the gun as a 35 mangum or a 45 mangum, he did not remember which. He then admitted that the perpetrator gave him the gun after the shooting and asked him to sell it for him, which he did. Perkins indicated that at the time of this sale, he did not know that the gun was involved in any crime. He also indicated that he knew the identity of the man he sold the weapon to, and that this perosn still had the gun. He would not identify the two perpetrators by name, but indicated that they both live in the area, one with his grandmother. He said that both men were scared, and no longer come out of their homes after dark.

After this Perkins told Mr. Brown that a friend, Whom he identified as an insurance man, recorded all of the information pertaining to the crime on paper. He indicated that this man intended to meet with Mr. Liuzza, at which time

he would present him with this information. Perkins ended the conversation by informing Mr. Brown that he would leave to meet his friend, who got off of work at 5PM, after which they would return to the hotel and speak with Mr. Liuzza.

Before concluding the meeting, Mr. Brown asked Perkins if he would give him his name. Perkins responded by identify himself as "RICHARD", after which he informed Mr. Brown that he also uses the moniker of "FUNK". Mr. Brown then asked him if he would be willing to provide him with his Social Security number for identification purposes. Instead of reading his number himself, Perkins presented his Social Security Card to Mr. Brown, who promptly recorded his Secial Security number, as well as his name. Following this Perkins left the office, promising to return with his friend at 5PM.

When the meeting ended, Det. Curole checked the name Richard Perkins through the Criminal Records file of the New Orleans Police Department and located a criminal record on a Richard Perkins, alais "FUNK",

residing at [redacted], as of July of 1983. This record reflected previous municipal arrests for obstructing a street, and placing garbage in the stree. The record also listed Perkins social security number, which matched the one Mr. Brown recorded from the social security card present by Perkins at the meeting.

At 8:30 PM, Monday, January 14, 1985, Mr. Brown received a telephone call from Richard Perkins, who contacted him at the hotel. Perkins advised him that he and his friend would arrive at the hotel at 9:30 PM, and demanded to meet with Mr. Liuzza. Perkins indicated that the meeting would have to take place at the time, and under the circumstances he specified, or else he would divulge nothing, After arranging the meeting with Mr. Liuzza, Mr. Brown contacted Dets. Curole and Demma who returned to the hotel along with Det. Charles Folmer, who installed the equipment alluded to earlier.

At 9:40 PM, Richard Perkins and his friend, who identified himself as Gregory Dawson, arrived at the Internation Hotel and met with Mr. Bill Brown and Mr. Ray A. Liuzza. During this meeting Perkins identified the triggerman as John Thompson, and his accomplice as Kevin Freeman, alais Kojak. Perkins said that the two were out cruising the street looking for someone to rob when they happened upon Liuzza. Believing that he carried a lot of money because he was well dressed and lived in a fashionable neighborhood they decided to rob him. Both Thompson and Freeman were initially involved in the robbery, but Freeman apparently had second thoughts and left Thompson before he completed the act. Freeman ran to his vehicle, which he described as a 1975 Monte Carlo, color burgundy, and drove off. Before departing, Freeman heard the gunshots Thompson fired as he murdered Liuzza. Perkins repeated that

Thompson stole a watch, a ring, and a wallet containing credit cards but no money from the victim during the robbery.

Perkins described both Thompson and Freeman as friends of his. Following the incident, both Thompson and Freeman told Perkins about the robbery. Thompson told him that Liuzza was going to grab the gun, which forced him to shoot. Three days after the robbery, Thompson gave Perkins a gun which he asked him to sell for him. He described the gun as a large black pistol with brown wooden handles. He later sold the gun to a man known to him as J.R., who still has the weapon in his possession. Thompson also gave the other property, the ring and the watch, to other people to sell to J.R.

Freeman told Perkins that they were out looking for someone to rob and that he knw that Thompson had the gun, but didn't think that he would shoot anyone. They purposely cruised the St. Charles Avè. area looking for a white man to rob because they believed the people in that area were rich and carried a lot of cash. When he realized that Thompson intended to shoot Liuzza, he left him and ran to his vehicle.

As he reached his automobile, he heard several gunshots, at which time he entered his vehicle and drove away. Freeman later expressed a suspicious that Thompson now intended to kill him to keep him from telling the police about the

robbery.

Perkins also told Mr. Brown that he called Crimestoppers twice and relayed this information to Det. Williams, but refused to provide his name. At the end of this meeting, Perkins indicated he would be willing to meet with Homicide Detectives and tell them what he knew, as long as he remained anonymous. Following this the meeting was concluded.

It should be noted that each of the two meetings between Richard Perkins and Bill Brown were clandestinely recorded. The cassette tapes on which these meetings were recorded were marked as evidence, and are now contained in the case file.

On Wednesday, January 16, 1985 at 10AM, Mr. Bill Brown contacted Det. Curole in the Homicide Office and advised him that he had recently spoken to Richard Perkins, and that a meeting had been arranged for 1:30 PM at the International Hotel. During this conversation, Perkins indicated that he would be willing to speak to the detectives investigating the incident during the meeting.

At 1:43 PM, Mr. Bill Brown met with Richard Perkins and Gregory Dawson in the lobby of the International Hotel and escorted them to Room 428 where Dets. Curole and Demma were waiting. As the meeting commenced, Det. Curole explained to Richard Perkins and Gregory Dawson that aformal statement from Perkins

would be required before any official action could be taken against John Thompson or Kevin Freeman. Although Richard Perkins expressed concern for his safety, he agreed to render a formal, typewritten statement, provided his name was not released to the news media.

At 2:11 PM, Wednesday, January 16, 1985, Det. Donald Curole began taking the statment of Richard Perkins, NM, [redacted]-64, residing [redacted] Present in the room during this statmenet were, Det. Marco Demma, Mr. Bill Brown, and Mr. Gregory Dawson. Mr. Perkins began his statement by verbally identifying the two perpetrators and John Thompson and Kevin Freeman. At 2:18 PM, Det. Curole allowed Mr. Perkins to view a previously prepared photographic lineup containing a photo of the suspect John Thompson. Upon reaching the photo of John Thompson, Mr. Perkins pulled the photo from the stack and positively identified it as that of John Thompson. Mr. Perkins then signed and dated the rear of the photo he identified, and initialed and dated the remaining photographs. Following this, at 2:22 PM, Det. Curole allowed Mr. Perkins to view a second set of photographs which included that of Kevin Freeman. Again upon reaching the photo of the suspect Mr. Perkins positively identified it as that of Kevin Freeman. Det. Curole then requested that Perkins sign and date the rear of the photo he identified, and initial and date

the remaining photcgraphs.

Following this identification, mr. Perkins provided a narrative of the information he possesed. He began by saying that three days after the murder, on a Sunday at about 4 or 5PM, he met with John Thompson at his residence. The two then walked to a park located on Martin Luther King Blvd which is where Thompson first mentioned the pistol. When Thompson asked Perkins if he knew anyone that wanted to buy a gun, Perkins asked him what was wrong with it. Thompson replied that he had loaned it to a friend and that this friend had shot someone with it during a robbery. Thompson then suggested that they offer the weapon to J.R. Thompson told Perkins that the two of them would walk to J.R.'s apartment, with Perkins going inside to make the sale while he waited outside. The two walked to Thompson's mother's residence in the Melpomene Project where Thompson acquired the weapon. Perkins described the pistol as a big black handgun with brown handles, on which there was a symbol containing the head of a bull and the word "Tauras ". He further described the weapon as a .357 caliber, or a .45 caliber.

After Thompson presented Perkins with the unloaded revolver they walked to J.R.'s apartment, which was also in the Project. Perkins entered the apartment alone and sold the weapon to J.R. for $75.00 dollars, a bag of marijuana, and "a bag of tea". Following this transaction, Perkins exited the apartment and met with Thompson, who was waiting in a Project hallway on Thalia St. During a brief

meeting, Perkins turned all of the proceeds from the transaction over to Thompson, after which they departed for their respective destinations. At the time of this occurance Perkins noticed a change in Thompson's behavior which led him to believed Thompson "had something on his mind". He maintained however that he had no knowledge of Thompson's involvement in the crime at this point.

A couple of days after the sale of the weapon, Perkins watched a television newscast which provided some details of the murder of Ray T. Liuzza. After viewing this newscast, Perkins began suspecting Thompson of being involved in the killing and further believed that the weapon he sold to Jr. was the murder wapon. A short time after this newscast, Perkins learned that Thompson had been arrested for "an attachment". It should be noted that New Orleans Police Department records reflect that John Thompson was arrested at the intersection of Dryades and Terpsichore on Wednesday, December 12, 1984 at 6:45 PM on an outstanding warrant. This arrest occured approximately twently four hours after the news media broadcast a report offering a $15,000.00 dollar reward for information leading to the arrest of the person responsible for the murder of Ray Liuzza. Thompson subsequently gained his release by posting a security bond on Tuesday, December 18, 1984.

Three days prior to Thompson's release,

Perkins had a conversation with Kevin Freeman in which Freeman confessed to the robbery. Freeman stated that Thompson had come to his residence and began speaking of his intentions to rob someone. The pair then entered Freeman's Monte Carlo and began cruising the area surrounding St. Charles Ave. "because they knew some rich people lived around there". Eventually Freeman parked his vehicle in front of Katie's Beauty Salon located in the 1800 block of Josephine St., near the corner of Dryades. From there the two began walking down Josephine St., toward St. Charles. When they reached the intersection of Baronne and Josephine Sts., they observed Liuzza park his vehicle on Josephine St., and then began walking toward the driveway of his complex. According to Freeman, Thompson then decided to rob Liuzza "because he was white, and was wearing a nice suit". So the pair walked up to Liuzza and Thompson pulled his gun on him. According to Freeman, as Liuzza handed over his property he continually begged Thompson not to shoot him. At this point Freeman became freightened suspecting that Thompson due to his narcotic induced intoxication would shoot Liuzza. He then ran from the scene, while the robbery was still in progress, and returned to his parked automobile. When he arrived at his vehicle, Freeman heard a series of gunshots fired, after which he entered his car and drove away, leaving Thompson behind.

On the day John Thompson was released from prison, later identified as December 18,

1984, he spent the night at Perkins' residence. During a conversation, Perkins mentioned that Freeman accused him of killing Liuzza. With this Thompson replied "man that nigger still running his mouth", after which he threatened to kill Freeman. Thompson then admitted he killed Liuzza and related the following sequence of events. After proceeding to Freeman's residence, the two got into Freeman's car and began looking for someone to rob. After Freeman parked the car, Thompson told Freeman that if they walked down that way (meaning toward St. Charles Ave) they would meet one of the rich people who lived there. As they walked down Josephine, Thompson observed the victim parking his car. Thompson thendecided to rob this man because he "was white, and well dressed, and had money". Thompson told Perkins that the robbery occurred by the driveway at the end of the building. After pulling his pistol on Liuzza, he began giving Thompson his property, which consisted of a watch, a ring, and a wallet, which Thompson handed to Freeman. At this point, according to Thompson, the victim reached for Thompson's weapon, and the gun discharged. Thompson admitted emptying his weapon at Liuzza before fleeing the scene. He also told Perkins that Freeman had fled the scene with Liuzza's wallet before he shot him. When Perkins asked about the gun he sold to J.R. for him, Thompson admitted it was the gun he used in the killing. He then said "you see J.R., he don't know. He got everything and he don't know what he got". Thompson told Perkins that he acquired a

watch, a ring, and a wallet full of credit cards, but no money from Liuzza.

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A short time after these conversations took palce, Perkins went to a friend, whom he identified as Gregory Dawson, and told him what Thompson and Freeman had said. As he talked, Mr. Dawson wrote all of the information down on a large piece of paper. It should be noted that when this subject arose, Mr. Dawson handed Det. Curole a large white cardboard folder with the words "Metropolitan Life Insurance Company" printed on front. Inside the folder are handwritten notes outlining the information provided to Mr. Dawson by Perkins. The information contained in these notes corresponds with the information Perkins supplied to Det. Curole during his statement. After reviewing this information, Det. Curole requested that Perkins sign and date the cardboard page on which the notes are written. These notes were retained as evidence and are now located in the case file.

Before concluding this statement, Perkins told Det. Curole that the information he possessed weighed heavily upon him, resulting in loss of appetite and insomnia. His belieft that Thompson and Freeman should be imprisoned for what they did prompted his decision to tell Liuzza's father what he knew.

Richard Perkins statement was concluded at 3:53 PM on Wednesday, January 16, 1985. An

original copy of Perkins signed statement is now contained in the case file.

After concluding this statement, Perkins informed Det. Curole that he knew where J.R. resided, but did not know his real name, or the address. Before leaving the hotel, Perkins promised to obtain J.R's address and relay it to Det. Curole before the end of the day.

At 6:30 PM, Richard Perkins telephoned Det. Curole in the Homicide Office and identified J.R.'s residence as [redacted] According to Perkins, the apartment could be identified by a large spotlight which was positioned in the window and shone down on two large motorcycles parked in the grass beneath the window.

From the statements of Richard Perkins and Kenneth Carr, Det. Curole and Demma obtained sufficient probable cause to suspect John Thompson and Kevin Freeman of the murder of Ray T. Liuzza. These suspecions led the investigators to prepare arrest warrant applications for Thompson and Freeman, and search warrant applications for the dwellings located at [redacted] (Thompson's residence) [redacted] (Freeman's residence), and [redacted] (the reported residence of J.R.).

At 12:05 AM, Thursday, January 17, 1985, Dets. Donald Curole and Marco Demma proceeded to the Criminal Courts Building, 2700

	Tulane Ave., where they met with Magistrate Commissioner Nils Douglas in his chambers. After reviewing the previously prepated applications, Judge Douglas issued arrest warrants for John Thompson and Kevin Freeman, charging them
	* * *
PAGE 31 OF 35	
	Mr. Harris told Det. Curole that he purchased the ring from NUT in December, about a week after he purchased the pistol from Richard Perkins. The transaction occured at his apartment at night, but again he could not remember the day or date. Mr. Harris paid Nut (John Thompson) $10.00 dollars for the ring, which Thompson indicated he intended to use to purchase a "clicker". Det. Curole asked Harris if he knew Nut's real name, and he replied he did not. At 5:33 AM, during the course of this statment, Det. Curole allowed Mr. Harris to view a previously prepared photographic lineup containing the photo of John Thompson. After carefully viewing each photograph, Mr. Harris positively identified the photo of John Thompson as the man that sold him the gold ring. Mr. Harris then signed and dated the rear of the photog he identified, and initialed and dated the remaining photographs. The photographs utilized in these identifications have been marked as evidence, and are now contained in the case file. An

original copy of Mr. Harris signed statement is also contained in the case file.

At 5AM, Thursday, January 17, 1985, Det. Marco Demma relocated Kevin Freeman from the holding cell to a private office where he formally advised Freeman of his constitutional rights from Rights of Arrestee form # 215377. Mr. Freeman informed Det. Demma that he fully understood his rights, and intended to waive those rights and speak with Det. Demma. Mr. Freeman then signed the form, indicating he understood his rights and wished to waive them.

In a subsequent verbal interview, Freeman initially denied any involvement in the robbery/murder of Ray Liuzza. However when Det. Demma confronted him with the fact that someone had relayed details of his involvement in the incident, Freeman withdrew his denial and admitted he participated in the robbery with another man, whom he accused of killing Liuzza. Det. Demma then asked Mr. Freeman if he would be willing to render a formal confession of his involvement in this crime. Mr. Freeman replied that he would, but first wished to consult with a member of his family.

At 5:20 AM, Kevin Freeman telephoned his sister, whom he identified as Debra Freeman, from the Homicide Division Office. During this conversation, Freeman informed his sister that he was involved in the robbery of Liuzza, but that John Thomas (Thompson) actually killed him. He then related some of the details of the

crime to his sister. Before concluding this conversation, Freeman advised his sister that he had been arrested for this crime, and was now at police headquarters. He further informed her that he intended to tell the police everything he knew about the illing. After concluding this conversation, Mr. Freeman advised Det. Demman that he was now willing to render a formal confession

* * *

PAGE 33 OF 35

known to him as "Funk" about the shooting. Freeman continued that Funk (Richard Perkins) approached him one day and told him he knew that Thompson shot that man on Josephine St. Freeman could not recall when this conversation took place, and maintained that he did not tell Funk anything about the incident.

During the course of this statement, Mr. Freeman repeatedly refered to Thompson as "Nut". When Det. Demma asked Freeman if he knew Nut's real name he replied "John Thomas", instead of Thompson. At 7:45 AM, Det. Demma allowed Mr. Freeman to view the previously prepared photograhic lineup containing the photo of John Thompson. When Freeman reached the photo of Thompson, he pulled it from the stack and positively identified it as "Nut". Freeman then signed and dated the rear of the photo he identified, and initialed and dated the remaining photographs. An original copy of Kevin Freeman's signed statement is now contained in the case file, and is available

for future reference.

At 8:30 AM, Dets. Donald Curole and Marco Demma escorted Kevin Freeman to Central Lockup where he was booked in violation of RS 14 Art 30 relative to the murder Ray Liuzza, and RS 14 Art 64 relative to the Armed Robbery of Ray Liuzza.

At 9AM, Thursday, January 17, 1985, Det. Curole met with the witness, Paul Schliffka, at his apartment at 2026 Baronne St. During this meeting Det. Curole allowed Mr. Schliffka to view the two previously prepared photographic lineups containing the photos of John Thompson and Kevin Freeman. Mr. Schliffka carefully viewed the photographs in each lineup, but was unable to recognize any of the photos as that of the mand he observed fleeing the scene of the shooting.

At 9:30 AM, Dets. Curole and Demma were contacted by Det. Otho Stubbs, Firearms Examiner for the New Orleans Police Department. Det. Stubbs informed Det. Curole that he had just completed a comparison examination of a test pellet, fired from the recovered Tauras Revolver, Serial # 11387, with the two spent pellets recovered from the scene of Liuzza's murder. These examinations proved conclusively that the pellets recovered from the scene were fired by the Tauras revolver recovered from Jessie Harrison earlier that morning, identifying it as the murder weapon. Det. Stubbs later prepared a report outlining the

results of his examinations. A copy of this document is now contained in the case file.

At 9:45 AM, Thursday, January 17, 1985, Dets. Curole and Demma met with Miss Jody Beauregard and Mr. Bill Brown in the Offices of the Homicide Division. During this meeting, Det. Curole presented the gold initial ring, confiscated earlier from Junior Harris, to Miss Beauregard and asked if she recognized it. Miss Bearuregard immediately identified the ring as the one owned by her longtime boyfriend, Ray Liuzza. Miss Beauregard then signed and dated the envelope containing the ring she had

* * *

REPORTING OFFICER	REPORTING OFFICER	NOPD ACCESS NUMBER
Det. Donald Curole BADGE 1107	Det. Marco Demma BADGE 785	

TRIAL EXHIBIT #31
Office of the Orleans Parish District Attorney
Screening Action Form

and

TRIAL EXHIBIT #33
Office of the Orleans Parish District Attorney
Screening Action Form

[Fold-out Exhibits, see next 2 pages]

03-11-85 15:54 N S 5157 ATTY

THE DISTRICT ATTORNEY
PARISH OF ORLEANS

SCREENING ACTION FORM

Page ___ of ___ Pages

GW 4/1/85

TOSTERIO, JOSEPH

TROPEX, JOHN

Ø	2/25/85	WHITTAKER	BURT						
		ARM. ROB.	2	0	14		6X		

12/28/84

VICTIM: STEWART LAGARDE, JR

PROPERTY: A WALLET AND ITS CONTENTS

WEAPON: A .357 MAGNUM REVOLVER

FOLLOWS 1st° IN "B."

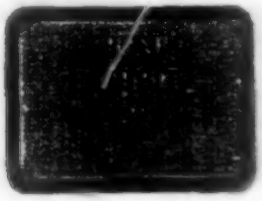
ERIC DUBELIER SPECIAL PROSECUTOR.

D 000005

GUN SAME MAKE & MODEL AS LIUZZA WEAPON.

VICTIM MADE PHOTO ID. WILL BE IN TOWN 3/11/85 IF PHYSICAL DESIRED. MAY WISH TO DO BLOOD TEST.

DA CASE JACKET



101A

EX 000119

BEST AVAILABLE COPY

OFFICE OF THE DISTRICT ATTORNEY
PARISH OF ORLEANS

SCREENING ACTION FORM

TORTERUO, JOSEPH

Page ___ of ___ Pages

CASE NO.

ACCEPTED

REFUSED

DIVERTED

REFERRED

THOMPSON, JOHN

G M 09/06/62

1302 Simonbolly St
N O, LA

85000986

M156718

Ø 2/25/85 WHITTAKER BWHT

220915

00404683

ITEM NO.	ARREST NO.	CHARGE	CLASS	INITIATION	TITLE	ATTEMPT STE	STATUTE	PARA	SUB PARA
L3237784	00934493	ARM. ROB.	2	0	14		64		

12/28/84 01718785

VICTIM: STEWART LAGARDE, JR

PROPERTY: A WALLET AND ITS CONTENTS

WEAPON: A .357 MAGNUM REVOLVER

ITEM NO.	ARREST NO.	CHARGE	CLASS	INITIATION	DISPOSITION REFUSAL CODE	TITLE	ATTEMPT STE	STATUTE	PARA	SUB PARA

FOLLOWS 1st° IN "B."

ERIC DUBELIER SPECIAL PROSECUTOR.

GUN SAME MAKE & MODEL AS LIUZZA WEAPON.
VICTIM MADE PHOTO ID. WILL BE IN TOWN 3/11/85 IF PHYSICAL DESIRED. MAY WISH TO DO BLOOD TEST.

D.A. CASE JACKET

[redacted]

DA011505

Exhibit #2

DA011505

EX 000122

TRIAL EXHIBIT #34

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA
SECTION: "B"
NUMBER: 305-826

STATE OF LOUISIANA)
)
VERSUS)
)
JOHN THOMPSON)
)

MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE

NOW INTO COURT, comes John Thompson, defendant herein, through undersigned counsel, and moves this court to issue an order requiring the state to turn over any and all evidence in keeping with BRADY V. MARYLAND. The defendant specifically requests the following non-exclusive list of items which, on information and belief, are believed to be exculpatory in nature:

I.

The names of any eyewitnesses and copies of any statements made by them. This request is based on newspaper articles obtained by the defense which indicate that eyewitnesses gave a physical description of the killer which is inconsistent with the defendant's appearance.

II.

Any and all photographs taken of the defendant which are in the possession of the State. This includes Bureau of Investigation photos as well as any other pictures seized or taken by the state. [handwritten note – see a photogression]

III.

The tape recording of the telephone call made by the defendant's grandmother. Mrs. Dorothy Armelin, to the New Orleans Police Department on January 17, 1985 at approximately 10:30 a.m. in which Mrs. Armelin related that the defendant was at her home willing to wait there to speak to the police about whatever it was they were investigating.

IV.

Any and all police reports made by the homicide investigators which must necessarily be replete with accounts of identifications inconsistent with the defendant's appearance. In addition, it is believed that state witnesses were offered inducements such as financial rewards for their testimony while others were threatened with prosecution and then offered leniency for their testimony. It is believed that these "deals" are or should have been memorialized in the police report.

V.

Accounts of any inducements offered or threats of prosecution made in order to secure the testimony of any witnesses.

WHEREFORE, defendant herein prays that motion for production of exculpatory evidence be granted.

RESPECTFULLY SUBMITTED:

/s/ Robert Couhig, Jr.
ROBERT COUHIG, JR.
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

/s/ Patrick Fanning
PATRICK FANNING
614 Tchoupitoulas Street
New Orleans, LA 70130
(504) 525-7556

TRIAL EXHIBIT #35

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
NO. 305-826 SECTION "B"

STATE OF LOUISIANA)
)
VS.)
)
JOHN THOMPSON)
)

ANSWER TO MOTION FOR PRODUCTION
OF EXCULPATORY EVIDENCE

NOW INTO COURT comes the State of Louisiana through the undersigned Assistant District Attorney for the Parish of Orleans, and for answer to defendant's Motion states:

I.

Statement of Mary Wells is attached. Not entitled, as to other witnesses.

II.

Not entitled.

III.

The District Attorney is not in possession of this tape recording.

IV.

None.

V.

To be provided.

[handwritten notes: →state's discussion w/ co-defendant →April 11]

WHEREFORE, the State prays that its answer be deemed good and sufficient in law, and that it be relieved of further answering.

_____

Assistant District Attorney

TRIAL EXHIBIT #36

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
CASE # 305-826 "B"

STATE OF LOUISIANA	)
	)
VS.	)
	)
JOHN THOMPSON	)
	)

AMENDED ANSWER TO MOTION FOR PRODUCTION OF EXCULPATORY EVIDENCE

NOW INTO COURT comes the State of Louisiana, through the undersigned Assistant District Attorney, and avers that:

I.

Mr. Paul Schliffka described a man leaving the vicinity of the crime scene as being approximately six feet tall. Additionally, Mr. Schliffka failed to make an identification from a photo line-up conducted on January 17, 1985.

II.

The Bureau of Identification photograph of the defendant is in evidence, and may be inspected.

IV. & V.

Co-defendant Kevin Freeman will have the charges against him reduced to violation of La.R.S. 14:30.1 relative to second degree murder.

WHEREFORE, the State prays that its answer be deemed good and sufficient in law, and that it be relieved of further answering.

/s/ E.A. Dubelier
ASSISTANT DISTRICT ATTORNEY

JA 655

TRIAL EXHIBIT #45

[unreadable name] 5/2/85

CRIME LABORATORY
NEW ORLEANS POLICE DEPARTMENT
715 S. BROAD ST.
NEW ORLEANS, L.A. 70119

APRIL 9, 1985

REPORT OF THE CRIME LABORATORY

To: DISTRICT ATTORNEY'S OFFICE
ATTN: ADA, BRUCE WHITAKER

Evidence Received:
4-4-85

Type of Investigation:
ARMED ROBBERY

Item No:
L-32377-84

Examination Requested:
BLOOD

Subjects:
VICTIM: Stewart LaGarde

Specimens:

1. One piece of victim's pants leg.

2. One tennis shoe.

RESULTS:

Stains on specimen 1 yielded positive serological reactions for group B human blood.

Stains on specimen 2 yielded positive chemical tests for the presence of human blood. Attempts to type this blood were unsuccessful.

/s/ Walter Strata
WALTER STRATA
CRIMINALIST II

WS/rh M74424-4

JA 657

Item No. L-32377-84 Analyst: Strata

CRIME LAB

To: D.A.'s OFFICE

Accused: _____

_____

Victim: Stewart LaGarde

Date: 4/9/85

CRIME LABORATORY
NEW ORLEANS POLICE DEPARTMENT
715 S. BROAD ST.
NEW ORLEANS, L.A. 70119

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/s/ Walter Strata
WALTER STRATA
CRIMINALIST II

WS/rh

CRIME LABORATORY
NEW ORLEANS POLICE DEPARTMENT
P.O. BOX 51480
NEW ORLEANS, LA. 70150

REPORT OF THE CRIME LABORATORY

[Handwritten Report]

To: District Attorney's Office
Attn: Ada Bruce Whitaker

Evidence Received: 4-4-85

Type of Investigation: Armed Robbery

Item No: L-32377-84

Examination Requested: Blood

Subjects: Vic: Stewart LaGarde

Specimens:

1. one piece of victim's pants leg

2. one tennis shoe

Results:

Stains on specimen 1 yielded positive serological reactions for group B human blood.

Stains on specimen 2 yielded positive chems tests for the presence of human blood. Attempts to type this blood were unsuccessful.

WS
4-9-85

TRIAL EXHIBIT #49

IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

State of Louisiana	:	Case No. 305-826
v.	:	VOL R.S. 14:30
John Thompson	:	Murder Case

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* * *

[p.76 Direct Examination of Detective David Carter]

from his back area. His back was at a perpendicular degree to the sidewalk at that point.

Q Do you recall interviewing any witnesses on the scene?

A Yes, sir, I did.

Q Do you recall the names of any of the witnesses?

A I believe there was one Mr. Schliffka -- I don't know how to pronounce his name.

Q Were any witness able to give you any description of the alleged perpetrator?

A Yes, sir, he did.

Q Did anyone else?

A No, sir. Not that I can recall.

Q Do you recall the description given to you?

A Yes, sir, I do. It was a black male. He was described as being about six feet tall. He was wearing a black leather jacket and dark pants. He was also dark complected.

Q Was any further description given to you of the perpetrator by mr. Schliffka?

A No, sir.

Q Were there any other witnesses that were able to give a description of the perpetrator?

A No, sir.

Q Thank you, Officer. I have no further questions.

Please answer the defense counsel's questions.

[p.77]

CROSS-EXAMINATION

BY MR. COUHIG:

Q Officer, did Mr. Schliffka tell you that there was one perpetrator, or two?

A He stated, that he had only seen one perpetrator.

Q Did you ask him about the hair?

A Excuse me?

Q Did you ask him about the perpetrator's hair?

A Yes, sir. We tried to ask him as much as we could about the description.

Q Tell the jury what he said about the man's hair.

A I can't recall at this time.

Q Do you have a police report? Did you fill out a police report?

A Yes, sir. My partner did.

Q You recalled that you were called at 12:43. Did you review that police report before testifying today?

A Yes, sir, I did.

Q Would your police report contain the description that Mr. Schliffka gave you?

A I don't recall that he did.

Q Do you have the police report with you today?

A No, sir.

Q Did you send out, call your dispatcher, and give any sort of description of the perpetrator?

A Yes, sir, we did.

Q Would that have contained the condition of the hair

[p.78]

if you'd gotten it?

A I'm sure that it would.

Q Is it your testimony that you can't recall that today?

A That is true.

BY MR. COUHIG:

I'd ask the district attorney if they have the police officer's statement, or a report, that he be allowed to look at it now, and refresh his memory.

BY MR. DUBELIER:

No problem, Your Honor, as long as he gets off the witness stand.

BY THE COURT:

He will get off the stand.

Officer, I'd ask you to look at it for any detail of the description, not just the hair cause I'm sure that'll be coming up next.

REPORTER'S NOTE: The witness stepped down from the witness stand, and went to the prosecutor's table to review the police report.

BY MR. COUHIG:

Q Describe the hair.

A Okay. It was black and short, afro style.

Q How tall was he?

A Approximately six feet.

Q Thank you, sir. No further questions.

BY MR. DUBELIER:

I have no further questions.

* * *

JA 670

TRIAL EXHIBIT #50

State of Louisiana v. John Thompson

Murder Trial Transcript

(May 7, 1985)

* * *

[p.39]

KEVIN FREEMAN called as a witness by the state, after being first duly sworn by the minute clerk, testified as follows:

DIRECT EXAMINATION

BY MR. DUBELIER:

Q. Mr. Freeman, I'm going to ask you to lean forward, and speak into the microphone, so that everyone can hear you.

Would you state your full name, please?

A Kevin Freeman.

Q And, your home address, sir.

A 2053 Jackson Avenue.

Q Where are you living right now?

A With my grandmother.

Q Where are you living right now?

A 2218 Felicity Street.

Q Are you in jail now?

[p.40]

A Yes, sir.

Q And, how long have you been in jail for?

A For four months and a half.

Q How old are you, Mr. Freeman?

A Twenty.

Q Have you ever been convicted of a crime before?

A Carrying a concealed weapon.

Q All right. Now, when did that occur?

A In '80.

Q And, what was your sentence for that crime?

A Ten weekends, and a year and a half probation.

Q I'm going to ask you to speak up.

A Ten weekends, and a year and a half probation.

Q All right. Now, have you ever been convicted of any other crime?

A No, sir.

Q Mr. Freeman, did you have a discussion with me, or several discussions over the past few weeks, in regard to you testifying in this case?

A Well, we talked once or twice.

Q All right. And, what did I offer you in return for your testimony in this case?

A Second degree murder with a life sentence, or accessory to the fact with five years.

Q All right. So essentially, what you were offered, was go to trial for second degree murder, or plead to accessory?

A Yeah.

[p.41]

Q All right. Is it your understanding if you plead to accessory, you would get five years?

A Mmhmmm.

Q All right. Has anyone else promised you anything in regard to your testimony in this case?

A No, sir.

Q All right. Mr. Freeman, do you know this man right here?

A That's Mr. John Thompson.

Q All right. Do you know him by any other name?

A Nut.

Q Nut?

A Mmhmmm.

BY MR. DUBELIER:

I would ask that the record reflect the witness has identified the defendant John Thompson.

BY THE COURT:

So ordered.

BY MR. DUBELIER:

Q Mr. Freeman, I'm going to call you back -- call your attention back to December 6th, of 1985, in the early morning hours, 12:30 or so in the morning, and ask if you had the occasion to run into Nut on that morning.

A Yes, sir, I ran into him.

Q I'm going to ask you to slowly and carefully tell the jury how you came into contact with Nut, and what happened on that evening, and go into

[p.42]

as much detail as you remember, and speak up so the jury can hear you. Talk into the microphone.

A Well, I was coming from my sister house from out of St. Thomas Project when I saw John. When I seen him on Prytania Street, while I was coming on Josephine. I was coming up Josephine when I seen Nut, and Nut stopped me. I told him, I'm trying to get home because I'm about to run out of gas. Nut

stopped me, and asked me for a ride. Since I knew him, I went on, and give him a ride since he stay by my house. I gave him a ride, and I told him, I didn't have that much gas in my car. I told him, I didn't have that much gas, so we rides and gets over on the other side of St. Charles and Carondelet when my car went to spitting gas. I know it was going to run out of gas, so I parked it in the middle of the block of Carondelet. When I parked in the middle of the block, I locked up the car, and started walking home with Nut. I asked Nut if he had any money. Nut asked me if I wanted to make some money. When Nut asked me if I wanted to make some money, he said, "I got the heat with me," and we started walking. I say, "Man, you riding in my car hot without letting

[p.43]

me know." So, that's when we started walking hone. That's when the white guy pulled up. When the white guy pulled up, Nut said, "I'm going to hit him." When Nut said, "I'm going to hit him," I said, "Go ahead. I'm going." So, when Nut told me he was going to hit the white guy, the white guy got out the car, and walked across the street. By the time he decided to go hit the white guy, the white guy had done got out the car, and walked across the street -- not right across the street . . . excuse me, I messed up. Could I go back?

Q Sure.

A All right. When we was walking down the street, I seen Nut pull the pistol from his pants, and that's when I started backing away from him.

BY MR. FANNING:

Your Honor . . . excuse me, Mr. Freeman. I'm going to interpose an objection at this time, and ask that the D.A. be confined to asking questions, and receive responsive answers as opposed to this narrative form. I see that we now have the witness interrupting himself, going back to change some of his testimony, and I think that's a danger we're going to fall into if the D.A. isn't compelled to ask questions, and get answers, instead of

[p.44]

getting this long colloquy by the witness.

BY MR. DUBELIER:

Your Honor, I'm perfectly entitled to ask him what happened, and let him tell what happened.

BY THE COURT:

Objection overruled.

BY MR. DUBELIER:

Q Go ahead, Mr. Freeman.

A Well, when I seen Nut pull the pistol from his pants, he ran across the street, and grabbed the white guy behind his back, and throw him on the

ground. By the time he had him on the ground, I was about a half a block away from Dryades Street, when I heard a shot. Then, I heard some more shots. I was running into Saratoga, when I seen Nut running into Dryades Street. I ran home, and took my bath, and went to sleep.

Q Mr. Freeman, when Nut threw the man down on the ground, did he go down with him?

A Yes, sir.

Q All right. Did you see him get up?

A No, sir.

Q All right. You were looking in the other direction?

A I was gone.

Q All right. Now, did you get a look at the gun that Nut had that night?

A Yes, sir.

[p.45]

Q I'm going to show you what's been marked as State's Exhibit One for identification purposes. Does this appear to be the same gun that Nut had with him that night?

A Yes, that's the gun.

Q I'm going to show you what I mark as State's Exhibit Two for identification purposes. Does that

appear to be a photograph of the vehicle that the white man got out of?

BY MR. FANNING:

Your Honor, I'm going to object to the form of the question as being leading, and ask the D.A. to simply ask him what does that appear to be, as opposed to pointing things out for him.

BY MR. DUBELIER:

Q What does that appear to be, Mr. Freeman?

A The car.

Q Yes.

A I don't know exactly the name of the car, but that's the car, that the white guy got out of.

Q Mr. Freeman, can you remember what John Thompson was wearing on that night?

A He was wearing a big black heavy jacket with -- I think he was wearing jeans that night.

Q Do you remember what kind of shoes?

A Tennis shoes.

Q What kind of car were you driving that night?

[p.46]

A A '74 Monte Carlo.

Q Did you ever go back, and get some gas for your car, and move the car?

A The same night? No, sir.

Q Did you ever go back any time later?

A No, sir.

Q All right.

A That morning, I went, and got my car.

Q All right. How did you get the car?

A My grandmother had given me Two Dollars to go get some gas that morning. She woke me up.

Q Now, later on the next day, you saw John Thompson, didn't you?

A Yes, sir.

Q Where were you when you saw him?

A Well, I was by my friend house on the corner round there. I pulled up. He stopped me and pulled me to the side.

Q All right. Did you have a discussion with him at that time?

A Yeah. He told me what happened.

Q All right. What did he tell you?

A He told me, the man didn't have anything on him. He just got a wallet with some credit cards, and he told me he took a ring too. I asked him why he had to shoot the man. He said, because they was wrestling for the gun -- with the man with the gun.

* * *

[Cross Examination by Defense Counsel Couhig p.52]

Q Who was with you then?

A The police.

Q I want to know everybody who was with you when you gave the statement.

A It was just two police.

Q Is that Officers Demma and Carole?

A Yes, sir.

Q And, what you told them in that statement is what you thought was the truth?

A That what happened.

Q All right. Let's see if we can go through that a little bit. That particular evening, you were wearing a white shirt, long sleeve.

A Mmhmmm.

Q And, slacks and tennis shoes.

A Yes, sir.

Q Now, your hair, was it about like it is today?

A Yes, sir.

Q About like that.

A All like that.

Q How tall are you?

A About six -- six feet.

Q Right around six feet.

A Right around six feet.

Q How much do you weigh?

A 160.

Q You parked your car on Carondelet?

A Right in the middle of Carondelet.

[p.53]

Q Okay. And, you come down Josephine -- Carondelet intersects it. And, tell me if I'm correct, it comes in, there's an intersection between Josephine and Carondelet. If you were coming down Carondelet,

you turn to the left, go a little bit, and then, turn to the right and stay on it.

A I was coming down . . . all right, this is Carondelet.

Q Okay.

A Carondelet swings like that.

Q Yes, sir.

A I'm coming down Josephine.

Q Okay.

A And, I park my car right here.

Q Right at the little swing.

A Right in the center of it.

Q Right in the center of where Carondelet meets Josephine?

A Right in the center, right exactly in the center.

Q All right. So, if someone said that you parked an Baronne Street, it would be an error.

A Yes, sir.

Q It wouldn't be true.

A No, sir.

Q Now, if someone said, that you parked beyond Baronne Street, and then, were walking back towards St. Charles Avenue, would that be true.

* * *

[p.61]

A Well, when I went got my car around 8:30. I came back home, went to sleep, woke up. Around after 12:00, after 1:00 o'clock, something like that.

Q My apologies to you, sir. My question was not clear. After that day, when did you see him again?

A After that day?

Q Yes, sir.

A I haven't seen him. That was the only time I seen him.

Q Do you know what clicker is?

A Yes, sir.

Q What is clicker?

A Pcp.

Q Do you use it?

A No, sir.

Q Do you smoke marijuana?

A Yes, sir.

Q You were convicted once before of concealing a weapon. What kind of weapon was it?

A A 25 automatic.

Q It's a pistol?

A Yeah, a lil small pistol.

Q Mr. Freeman, you stated that you parked your car about a half a vlock away from where all this took place?

A That's about a half a block -- about -- I'd say about a whole block.

[p.62]

Q About one whole block?

A One whole block.

Q Did you have to cross any streets other than Carondelet to get there?

A Where to?

Q To where this incident took place.

A One street to get on the lefthand side.

Q I'm sorry. I wasn't clear. You had to cross Josephine to get onto the lefthand side.

A After I get out my car, I got on the lefthand side.

Q And, I know this may sound inconsequential to you, but I think it's important for us. You parked your car on Carondelet, or on Josephine?

A It was on Josephine -- that was Carondelet it was on.

Q Okay. At the little intersection between where Carondelet comes in here, and takes off there. In that little area?

A Yeah, with that little S, that's like it was another block.

Q And, did you park it in that "S" on the uptown side, or the downtown side of Josephine?

A It was on the righthand side.

Q On the righthand side. So that, when you got out, you had to cross Carondelet -- I mean, you crossed Josephine.

A Yeah, on the lefthand side.

Q And, it's your statement that that's the only street that you crossed.

[p.63]

A That's the only street.

Q And then, you all walked up . . . now, your grandmother's house, she lived on the right side, or

the downtown side of Josephine, or the uptown side?

A The left side.

Q She does? What street does she live on?

A On Felicity.

Q I'm sorry. Maybe my geography is not exactly right. As I'm coming down Josephine, is Felicity to the right, or to the left?

A Felicity to the right.

Q And, that's where she lived.

A To the right.

Q But, you were walking down the lefthand side of the street.

A That's right.

Q And, your mother lives on the lefthand side of the street.

A That's right.

Q Four blocks from where this took place.

A That's right.

Q Now, Mr. Freeman, it is your position that you are not involved in this murder at all. Isn't that true?

A Not at all.

Q But, the district attorney is still prepared to take you to trial for second degree murder.

[p.64]

A Yes, sir, because I didn't do anything.

Q That's all the questions I have. Thank you, sir.

REDIRECT EXAMINATION

BY MR. DUBELIER:

Q Mr. Freeman, have I, at any time, ever told you what to say when you took the witness stand?

A No, sir.

Q What did I tell you about testifying?

BY MR. FANNING:

We object, Your Honor. It's not proper redirect. None of this was raised on cross-examination.

BY MR. DUBELIER:

The heck it wasn't.

BY MR. FANNING:

It was the previous discussions between the D.A. and the witness as to what to say. Now, that was raised.

BY THE COURT:

I think the door was opened. Objection overruled.

BY MR. DUBELIER:

Q What did I tell you?

A About what?

Q About testifying?

A Testifying to what?

Q At the trial today.

A The second degree murder -- what I can get?

Q Right.

* * *

[p.403]

BY MR. WILLIAMS:

Your Honor, at this time, the state will call Miss Mary Lagarde.

MISS MARIE T. LAGARDE called as a witness by the state, after being first duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mimi, would you speak up, as if you were talking to somebody in the back of the courtroom.

Would you state your name, and where you live for the record, please.

A Maria Teres Lagarde, [redacted]

Q All right, Miss Lagarde, let me direct your attention back to December 28th, 1984. Do you remember where you went that night?

A I went to the Superdome.

Q Okay. And, who did you go with?

A My older brother Jay, and my younger brother Michael.

Q Okay, and how did you get to the Superdome?

A We drove.

Q And what kind of car did you all have?

A A Honda Accord.

Q Do you know where your brother Jay is right now?

A He's at the University of Virginia taking exams.

[p.404]

Q Okay. Now, do you recall last month coming to this Court, and testifying at a trial?

A Yes.

Q Okay. Now, do you remember back on the 28th, what happened when that robbery occurred?

A Yes.

Q Okay. I want you to tell the ladies and gentlemen of the jury what happened.

A As my brothers and I were leaving the Superdome, we were across the street, and walking toward our car, I saw a man walking down the street, and I got into the car, and he jumped into the back seat of the car, and told us that he had a gun, and to give him our wallets and keys.

Q Where were you seated in the car?

A I was seated in the passenger seat in the front.

Q Okay. Did you get a good look at that man, when he came up to the car?

A Yes, I did.

Q Do you see that man in the courtroom?

A Yes, I do.

Q Would you point him out, please?

A He's right there.

Q Is that this man right here?

A Yes, it is.

Q Miss Lagarde, is this the same man you identified when you came to trial before?

A Yes, it is.

[p.405]

BY MR. WILLIAMS:

Let the record reflect the witness has identified the defendant before the bar.

BY THE COURT:

So ordered.

BY MR. WILLIAMS:

Q When he got in that car, did he take anything from you?

A He took a couple of dollars from me.

Q Okay. And, who was in the back seat of the car?

A My little brother Michael.

Q And, how old is your little brother Michael?

A He's thirteen.

Q Okay, and who was driving the car?

A My brother Jay.

Q How old is Jay?

A He's nineteen.

Q All right. Now, once he got in the car, did he tell you what to do?

A He told us to sit, not to move, and that he wanted to take our car. He wanted my brother's wallet and keys.

Q All right.

A He tried to take a necklace of mine, but he didn't get it.

Q What did he do next?

A He told us to turn right, to go down a dark street.

Q Okay now, let me stop you for a second. Do you remember where you were parked?

[p.406]

A We were parked on the corner of Poydras and LaSalle.

Q Okay. And, is that on the same side of the street as the Superdome, or on the same side as City Hall?

A It's across the street from the Superdome.

Q Okay. And, what did he tell you to do with the car?

A He told us to start the car, and to turn right.

Q Okay. Was your brother driving the car at this time?

A Yes, he was.

Q Did he start the car, and turn right?

A No, he started the car, and turned left.

Q What did he do after he turned left?

A After he turned left, he wrecked into another car.

Q Okay. And, why did he do that?

A So . . .

BY MR. FANNING:

Objection, Your Honor. It calls for a conclusion.

BY THE COURT:

Sustained.

BY MR. WILLIAMS:

Q All right, Miss Lagarde, when he turned left, did that man, that you've identified, did he say anything to you all?

A Yes, he did.

Q What did he say?

A He said, "You're a fool. I'm going to kill you now."

Q No other questions. No, I'm sorry. I'm sorry. One moment. I show you what I've marked for

[p.407]

purposes of identification as State's Exhibit No, Twenty-three, a 357 pistol, that has formerly been marked State's Exhibit No. One, in Case No. 306-526.

BY MR. FANNING:

Judge, I'm going to make an objection at this time to S-23 being shown to the witness. I think that it's a pretty typical looking blue steel revolver, and I don't know that this little girl has any expertise in firearms, nor has it been proven that she saw any serial numbers or registration numbers, or could particularly identify this weapon. I presume that the state is going to ask her to look at it, and say, does this look like the weapon, and I think that that testimony is speculative, that it's not worthy of going before the jury at this time.

BY THE COURT:

Any response?

BY MR. WILLIAMS:

Yes, Your Honor, this is the same gun that was identified in the last trial, was introduced into evidence, and was accepted into evidence. It was formerly identified by this witness at the other trial.

BY MR. FANNING:

Excuse me, Your Honor. I wasn't here for the last

[p.408]

trial, so I'm not privy to all that.

BY MR. WILLIAMS:

There was an objection at the last trial by Mr. Thompson's former attorney, Mr. Bertel, and that objection was overruled.

BY THE COURT:

This objection is overruled also.

BY MR. FANNING:

Thank you, Judge.

BY MR. WILLIAMS:

Q Miss Lagarde, I show you a gun -- the pistol that you see right there, does that pistol look like the one that was used in the robbery?

A Yes, it looks like the one.

Q After your brother turned into the other car, what happened next?

A He told me to get out of the car.

Q Who did?

A My brother Jay. So, I got out of the car, and I was on the neutral ground asking for help.

Q Okay.

A During that time, there was a struggle between my brother and Mr. Thompson.

Q What was that struggle over?

A The gun.

Q Okay. What happened to the gun?

A My brother got possession of the gun, and was kicking Mr. Thompson in the face, and he kicked him

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out the car. My brother dropped the gun, and it went off.

Q Thank you. Answer their questions.

CROSS-EXAMINATION

BY MR. FANNING:

Q Good afternoon, Miss Lagarde. I'll be very brief. I have just a few questions for you.

You remember coming to trial, and another attorney who was representing Mr. Thompson at that time, asking you questions about the identification?

A Yes, I do.

Q Can you relate to the members of the jury, please, how that identification was made?

A The identification was made through pictures.

Q Okay. Did you first see one photograph of John Thompson?

A I had seen a picture of him in the newspaper.

Q Okay. And, how did you come to see that picture of him in the newspaper?

A My father brought the newspaper home, and I saw the paper.

Q Okay. Did your father show you the paper, and show you that picture, or did he just bring the newspaper home, and you happen to be reading it?

A He brought the newspaper home for me to look at the picture.

Q Okay. So, your father came to you with the newspaper, showed you the picture of John Thompson, and asked you if you recognized that man?

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A Yes, he did.

Q Okay. And then, you later went through some other identification procedure, is that correct?

A Yes.

Q And, in that procedure, after seeing the newspaper picture, you picked out John Thompson.

A Yes.

Q But of course, you had already seen his picture in the newspaper when you did that.

A Yes, I had.

Q Okay. Do you know what the man was charged with when you came to trial last time, and testified? Just if you know.

A Yes.

Q What was he charged with?

A He was charged with killing Ray Liuzza.

Q No, when you came the last time and testified I'm asking about?

A He was charged with armed robbery.

Q Okay. And, do you know what the verdict of the jury was?

A It was a verdict of attempted armed robbery.

Q Was the act of robbery completed? Did he take something from you?

A Yes, he did.

Q Okay. Was there a lot of questions being asked, and arguings going on about the identification procedure at that last trial?

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BY MR. DUBELIER:

Your Honor, objection.

BY MR. WILLIAMS:

I don't know that she can answer that. She was sequestered.

BY THE COURT:

You can only ask her as to what transpired with her.

BY MR. FANNING:

Q Okay. When you were on the witness stand, were you asked a lot of questions about the identification procedure?

A I was asked questions about the identification procedure.

Q Did you hear the closing arguments in the case?

A Yes, I did.

Q And, were they arguing about the identification procedure then?

A I don't remember.

Q You don't remember, you said?

A I don't remember if they were arguing about the identification process.

Q Okay. Thank you. And, John Thompson was found guilty of attempted armed robbery, is that correct?

A That's correct.

Q Do you know what sentence he got?

A He got forty-nine and a half years.

Q Okay. Miss Lagarde, as you sit here today, do you bear any animosity towards John Thompson for what

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happened?

A What do you mean?

Q Are you angry with him?

A I can't say that I'm angry.

Q How do you feel towards John Thompson?

A I feel he committed a crime, that could very easily he could have taken my life.

Q Okay, Miss Lagarde. That's all the questions I have.

Thank you.

BY MR. WILLIAMS:

No redirect.

BY THE COURT:

Okay. You can step down. Any further need for this witness?

BY MR. WILLIAMS:

No, sir.

BY THE COURT:

Okay, Miss Lagarde, you're free. You can either stay in the courtroom, or leave, whatever you want.

BY MR. DUBELIER:

You Honor, at this time, the state would offer, file, and introduce into evidence State's Exhibit Twenty-three.

BY MR. FANNING:

Your Honor, I object based on the fact that there's been no chain of custody shown to the gun, that there's not a proper identification,

* * *

Supreme
JUN 7 - 2010
OFFICE OF THE CLERK

No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX, Volume 4

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Petition for Writ of Certiorari granted March 22, 2010

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JA 703

TRIAL EXHIBIT #51

PARISH OF ORLEANS
OFFICE OF THE DISTRICT ATTORNEY

POLICY MANUAL

Honorable Harry Connick
District Attorney

Book number 7.

This manual is the property of the District Attorney's Office and may not be reproduced, removed from the office, or used in any manner without the prior approval of the District Attorney or his representative.

February 1, 1987

* * *

5.25 PRE-TRIAL – BRADY MATERIAL

In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called Brady material --- that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce Brady material is ongoing and continues throughout the entirety of the trial. Failure to produce Brady material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of Brady issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State.

* * *

TRIAL EXHIBIT #55

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

CASE NO. 305-826
VIO.: R.S. 14:30

[Dated June 23, 1995]

STATE OF LOUISIANA)
)
VERSUS)
)
JOHN THOMPSON)

Transcript of the MOTION HEARINGS held on June 23, 1995, before the HONORABLE PATRICK G. QUINLAN, Judge presiding.

APPEARANCES:

VAL SOLINO, ESQ., ASSISTANT DISTRICT ATTORNEY

MICHELLE MILLER, ESQ., ASSISTANT DISTRICT ATTORNEY

MR. COONEY, ESQ., COUNSEL FOR DEFENDANT

MR. TRENACOSTA, ESQ., COUNSEL FOR DEFENDANT

REPORTED BY:

CHARLENE W. FAUCHEAUX, CERTIFIED SHORTHAND REPORTER CRIMINAL DISTRICT COURT, SECTION "B"

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BY MR. TRENACOSTA:

Thank you, Your Honor.

BY THE COURT:

Is the Defense ready to proceed?

BY MR. COONEY:

We are, Your Honor.

As a preliminary matter, Your Honor, there are several witnesses that we will be calling, and we would like to ask that they be sequestered if you might. The witnesses are, Mr. Couhig, who will testify fist. Mr. Maseli, Captain Curole, Mr. Perkins and Gregory Dawson.

BY THE COURT:

All right, each of these witnesses, Mr. Couhig, you can remain in the courtroom, but the other witnesses who were just called, the Court is going to have to instruct you to step out in the hallway and instruct you not to discuss your

testimony with anyone except the lawyers involved in this case.

BY MR. SOLINO:

Judge, if I may, before we get started, I believe yesterday, Mr. Trenacosta and I were able to agree on a couple of stipulations to make things little bit easier today.

BY THE COURT:

You might just check to make sure all of the witnesses left the room, I don't know who they are.

BY MR. COONEY:

I believe they have, Your Honor. Thank you.

BY MR. SOLINO:

As the Court is aware, there is a tape of a conversation

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that was involved in this matter. Mr. Trenacosta's representative compiled a transcript of that tape as did my office. There are some minor discrepancies between the two. None of the substance is really changed, except as to several -- except as to three or four spots. What Mr. Trenacosta and I have agreed to with the Court's indulgence, is that both of the transcripts be made part of the record so that in

the event any future court needs to review this, both transcripts will be in the record, both parties will be able to make whatever arguments they see fit as a result of that. We also agreed to introduce into evidence without objection, a pristine copy of the tape that was in the possession of the New Orleans Police Department, as well as a copy of that tape that has been forwarded by Mr. Trenacosta to some expert who apparently filtered out the background noise and transcribed Mr. Trenacosta's tape, and I believe that's the agreement that we have. I believe Mr. Trenacosta is going to tell you that his copy of the tape, and I believe he would also tender his copy of his transcript along with that, and I will tender the State's copy of its transcript. I ask that the State's copy be marked for purposes of this hearing as State's Exhibit Nos. 1 and 2. And to keep the record clear, Judge, State's Exhibit No.1 is a transcript of the conversation held at the International Hotel on January 14, 1985,

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at 4:12 p.m. And State's Exhibit No.2 is a transcript of the conversation held at the International Hotel on January 14, 1985 beginning at approximately 9:40 p.m. I would ask that that be made part of the record.

BY THE COURT:

The Court will make it part of the record.

Defense?

BY MR. COONEY:

Yes, Your Honor, since we're doing a couple of housekeeping matters, I would like to tender into the record as Petitioner's Nos. 1 and 1A, which is the original of the tapes that Mr. Solino just referred to and Petitioner's Exhibit Nos. 10 and 11, which are the enhanced tapes of the original.

BY MR. SOLINO:

Judge, if I may, to keep the record clear, Defense Exhibit No. 1A and 1B, is a copy of the tapes made from the originals which were in Detective Curole's possession made in the presence of myself and Mr. Trenacosta by Detective Curole at the D.A.'s Office earlier this year.

BY MR. COONEY:

Also, Your Honor, to move things along a little bit, there are a number of exhibits that we want to refer to with Mr. Couhig. I thought what I might do is give a premarked set to Mr. Solino to the Court and to the Court's law clerk. Mr. Couhig has a set as well.

BY MR. SOLINO:

Judge, along these lines, we also had prior discussions

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with Counsel that the entire records of this case including transcripts and everything else that appears in the record by way of pleas are to be made part of the record for today. Therefore, all of these documents which are copies of what is part of the record of this case, obviously, wouldn't have objection to and Counsel for both sides can refer to them as they see fit.

BY MR. COONEY:

I think we're ready to begin with Mr. Couhig, Your Honor.

BY THE COURT:

All right.

MR. COUHIG called as a witness by the Defense, after being first duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION BY MR. COONEY:

Q Good morning, Mr. Couhig.

A Good morning.

Q Can you state your name for the record, please.

A Robert Couhig.

Q And what is your current employment?

A I'm a partner in the law firm of Adams & Reese.

Q Were you involved in the murder trial of John Thompson?

A Yes, sir, I was appointed by this court to represent Mr. Thompson along with Patrick Fanning.

Q Were you familiar with the role played at trial by Richard Funk Perkins?

A Yes.

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Q What was that role?

A Mr. Perkins was a critical witness on behalf of the prosecution in attempting to establish in part of the prosecution Mr. Thompson's involvement in the murder of Mr. Liuzza.

Q At the time of the trial, prior to the trial, was there public information about the availability of substantial rewards?

A We had seen it, I believe, on television and perhaps in the newspaper, yes.

Q What were some of the things that you wanted to try to establish at trial with regard to the testimony of Mr. Perkins?

A Well, as with any witness and in particular in Mr. Perkins' case, credibility of the witnesses are paramount. We wanted to establish with Mr.

Perkins that he had a motive for coming forward and giving testimony. We believed that he was doing so pursuant to a desire to collect on a reward. And we thought that would be pertinent to any Juror's deliberation as to the veracity of Mr. Perkins as to indeed the tenor of the prosecution's case.

Q In order to try to get at that type of testimony, did you make any inquiry of the prosecutors?

A Yes, sir, we did, virtually from our first discovery pleading throughout the course of discovery, pretrial motions, the trial itself, repeated requests, orally and in addition to the written requests, indeed right on up through the findings of the Jury and post trial.

Q In response to those requests, did you get any

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information from the State regarding the possibility of the reward to Mr. Perkins?

A The State's consistent position was that it had no knowledge of any such reward.

Q I would like you to look at an application for a Bill of Particulars, which has been marked as Exhibit No. 2.

A Yes, sir.

Q Do you recognize that document?

A Yes, sir.

Q What is it?

A It's an application for a Bill of Particulars filed by us in the early initial stages of this case.

Q I would like you to look at the answer to the application for the Bill of Particulars, which has been marked as Exhibit No. 3?

A Yes, sir.

Q Do you recognize that?

A Yes, sir, that is the responses I received from the State.

Q And also I would like you to look at the amended answer to the application for the Bill of Particulars which has been marked as Petitioner's Exhibit No. 4.

A Yes, sir.

Q Do you recognize that?

A Yes, sir. That is the amended answer that we got as I recall, virtually on the eve of trial, within two or three weeks of the trial.

Q Looking at the application for the Bill of Particulars, are there inquiries made in that application for information relating to a reward?

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A Yes, sir. At least it's my position there is. If one looks at the Interrogatory No. 10 and No. 11, I thought there was one more. 10 and 11, come rapidly to my mind, I think there's another one and I'll find it as we go through.

Q And in response to Nos. 10 and 11, did the State provide you with any information relating to a reward?

A No, sir.

Q Focusing on No. 17, in that you asked the State if it had any evidence that was materially favorable to the Defendant?

A Yes, sir.

Q Did you get any reward information in response to that?

A No, sir.

Q Did you also make a Motion for a Production of Exculpatory Evidence?

A Yes, sir, we did.

Q And is that the document in front of you that has been marked as Exhibit No. 5?

A Yes, sir, it was filed on February 25, 1985.

Q Is that a document that you prepared?

A Yes, sir.

Q In that document, did you request information relating to a reward?

A Yes, sir.

Q And where were those requests made, sir?

A In Item 5, excuse me, 4 and 5.

Q Can you just read quickly what's in the record, 4 and 5?

A Yes, sir. Any and all police reports made by

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the Homicide Investigators which must necessarily be replete with accounts of identification inconsistent with the Defendant's appearance. And because that's your normal Brady request, sir, and we knew about the reward, we went on, in addition, it is believed that State witnesses were offered inducements such as financial rewards for their testimony, while others were threatened with prosecution and offered leniency for their testimony. It's believed that these deals are or should have been memoralized in the police report. And in No.5, accounts of any inducements offered or threats of prosecution made in order to secure the testimony of any witness.

Q Did you receive an answer, an amended answer to your Motion for Production of Exculpatory Evidence?

A I received an answer, sir, a month later, on March 21st. In response to the first one they said there were none. Excuse me, that's Roman Numeral 4, and in response to No.5, they said they would be provided to me. They filed an amended answer on April 29th in which they related additional information in response to Roman Numerals 4 and 5, in which they said that Co-Defendant, Kevin Freeman, would have the charges against him reduced to violation of LA. R.S.14:30.1, relative to second degree murder. That was the totality of information provided to us, sir.

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Q For the record, is the State's answers to the Motion for Exculpatory Evidence, Petitioner No. 6 and State's admitted answer to the Motion for Exculpatory Evidence, Petitioner No. 7?

A Yes, sir.

Q Is it fair to say that the only information in response to Nos. 4 and 5 that you received was information related to the charges against Kevin Freeman?

A Yes, sir.

Q You received no information in response to your Motion to Exculpatory Evidence relating to a reward?

A No, sir.

Q Okay. Now, let's look at what Mr. Perkins says on the subject at trial. Do you have the testimony of Mr. Perkins in front of you?

A Yes, sir, you have provided me with a copy of the transcript.

Q I would like to direct your attention to Page 161.

A Yes, sir.

Q Where he's testifying on direct. Can you read into the record what he said with respect to the reward issue starting with, Mr. Perkins, has anyone promised you anything to come here and testify today to the end of the direct.

A Yes, sir, that's when Mr. Dubulier was questioning him.

BY MR. SOLINO:

I'm going to object to this, Judge, this transcript

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speaks for itself.

BY THE COURT:

overruled. Court will let him make the point.

BY THE WITNESS:

Mr. Dubulier asked him did anyone promise you anything if you went to the police and provided them with information about this case?

Answer: No, ain't nobody sent me to the police. When they come to me, I just went down myself, come looking for me and I just went down.

Question: Did anyone ever force you or threaten you to make you give a statement to the police?

Answer: No, ain't nobody done anything like that.

Question: Have I ever threatened, forced or coerced you to come here today and testify here today?

Answer: No, un-uh.

EXAMINATION BY MR. COONEY:

Q. As trial counsel for Mr. Thompson, what was the significance to you of Mr. Perkins' testimony with regard to the reward?

A They -- it appeared that they were going to be able to take a witness and who had a history that, if you look further into the direct, they attempted to sanitize his background and make him a "disinterested witness." By suggesting that he had nothing to gain by coming forward. That concerned me because it was our position and our belief that he was indeed induced to come forward by a reward or something else that we were not aware of, and if

you look further into the transcript you will see that I attempted to ferret it

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out from him whether in fact was he aware of a reward and whether he in fact had been given a job for example in order to induce his testimony. Whether there were other financial rewards out there. And in every instance he either evaded the question entirely or simply flat out said that he was not getting anything for his testimony.

Q What was the significance to you as trial counsel of Mr. Thompson, of Mr. Perkins' statement, "No,ain't nobody send me to the police, when they come to me, I just went down myself. Come looking for me, and I just went down.

A Again, it's a good citizen coming forward just trying to do the right thing and as opposed to putting it in the context of first going out and seeking a reward. In fact, if you recall, in my cross-examination I asked him specifically, and I think you can find reference to it on Page 177, how did you first contact the police to tell them that you wanted to talk to them? And he says, "I didn't contact them, they came to me. And I think if you put that in the context that there was no reward, it makes it seems like the police investigated it, they found this witness, and he simply cooperated with the police.

Q Looking at your cross, I direct your attention to Page 167, first, sir, 167 to 168, and I would like you to focus on the testimony beginning about two-

thirds of the way down, could you read into the record, starting where it says,

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"Would it also be a fair statement to say," and continue until near the bottom of the next page.

A I'm sorry, what page are you on, sir.

Q Page 167, sir, starting with, "Would it also be a fair statement."

A I'm sorry, Counselor, you may have to point it out to me. I'm looking at my copy and I don't see it.

"Would it also be fair to say, sir, that $15,000 is a lot of money?" That is the question I asked him. That was the information that we had that perhaps -- from the public, that there was a reward.

"Answer: What are you talking about.

Question: Just that $15,000 is a lot of money, is it not, sir?

Answer: Ain't man, I ain't finished school, I don't know nothing about that many numbers.

Question: Now, you said that on January 16th that the police came and talked to you; is that correct?

Answer: Yeah.

Question: Where did they meet you?

Answer: What do you mean, where did they meet me?

Question: Where did you talk to them?

Answer: Where did I talk to the police?

Question: Yes, sir.

Answer: Around my house.

Question: Was that the first time that you had talked to anyone?

Answer: Anyone about what?

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Question: About what took place?

Answer: Well, I really didn't know what took place.

Question: You still didn't know what took place?

Answer: Yeah, I know, yeah, from what they say, you know, come out of the horse's mouth, put it like that.

Question: Now, on January 16th, did you meet with the officers?

Answer: Yeah.

Question: How many of them?

Answer: Two.

Question: Where? At your house?

Answer: Huh?

Question: Had you before that time talked with anybody else in the law enforcement agency about this?

Answer: Nobody but the good Lord, sir.

Question: Thank you."

Q Now, Mr. Couhig, what were you trying to get at with this testimony?

A The thing I talked about before, the credibility of this witness.

BY MR. SOLINO:

Judge, I'm going to object to this, this transcript speaks for itself, after the fact argument. I think it's inappropriate at this point.

BY THE COURT:

Sustained.

EXAMINATION BY MR. COONEY:

Q Focusing on the rebuttal closing testimony in this matter, sir, do you have in front of you part of Mr. Williams' rebuttal closing?

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A Yes, sir.

Q And I direct your attention to Pages 353 to 354, starting with, "Let's talk about the reward money."

A Yes, sir.

Q Would you read that into the record, please.

A This is Mr. William's rebuttal to my argument. He says, "Let's talk about the reward money. You heard that talked about mostly out of the lawyer's mouths, Ladies and Gentlemen, and not one single person came and took this stand and told you anything about any reward money. There's not one word that is in evidence in this case from people who took the stand regarding reward money. If there had been, you would have heard them put somebody on and say so this person has made a claim on the money."

Q Thank you, sir. And to you, sir, as trial counsel, what was the significance of that statement?

BY MR. SOLINO:

Again, I'm going to object, it's irrelevant, it speaks for itself.

BY THE COURT:

Overruled.

BY THE WITNESS:

Your Honor, I put it in the context, if one looks at Mr. Williams' earlier statement and recalls that this was rebuttal. We had no evidence presented at the trial about a reward, we were not provided with any and we could not get any. The witness had denied any information about

[p.22]

a reward as had Mr. Carr. As a result, in my closing, I was unable to attack their credibility on that basic. Mr Williams in his rebuttal impeached, at Page 340, accurately sums up the situation. He talks about Mr. Perkins. He said he is the one that made the break in this case, Ladies and Gentlemen, Funk. No conviction. Did he show any reason why he would come here and lie. No prior convictions. And he was right. The way it was presented, that was the way Mr. Perkins came across. Mr. Williams in his closing was able to say all of this reward money is just hearsay, there's no direct evidence, there's nothing about it, and I think it was because -- and in fact he specifically comments on Mr. Perkins' statement that he was not getting any money, that he was telling him the truth, and I think those were his exact words, because there was no evidence to show otherwise. And then he says not at this point, anyhow. From my perspective, he brought up an issue that we had not covered in our close, put it on rebuttal, dealt with the information that was only privy to him and information that he

knew or certainly Mr. Perkins knew as not accurate.

EXAMINATION BY MR. COONEY:

Q I asked you earlier about the written requests that you made of the State for this information, were there also requests made orally to that?

A Yes, sir.

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Q Can you describe that?

A We, as the Court may recall, this was somewhat contentious because of the situation.

BY THE COURT:

I still remember that.

BY THE WITNESS:

Mr. Dubulier and I spoke, Mr. Williams and I spoke, very often, with repeated argument in front of this Court both on the record and off about whether Mr. Dubulier was forthcoming with his responses to discovery. The Court may recall, at least, to one instance, and perhaps others, I asked that he exercise his power to review Mr. Dubulier's file, because I did not believe we were getting the information that was pertinent – that was exculpatory in nature. I think it is fair to say that throughout the entire course of my working on this case we

consistently asked for this information. We consistently believed that we were not getting it.

EXAMINATION BY MR. COONEY:

Q I would also like you to direct your attention to the Motion for a New Trial, which is Petitioner's Exhibit No. 8, do you recognize that document?

A Yes, sir, I drafted and filed this one.

Q And that was drafted and filed on or around June 17, 1985; is this right?

A That sounds right, yes, sir. My copy has June 18th. June 17th, you're right.

Q In that document, did you ask for any relief in

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connection with the State's not producing evidence regarding a reward?

A Yes, sir, I asked for a new trial.

Q Can you direct your attention to where in this document you made that request?

A Well, what I did, the document covers what we perceived to be numerous errors in the conduct of the trial, specifically, in response to your question, sir, in Roman Numeral 2, Section B, the failure of the Court to require disclosure of the reward process resulted in the inability of the Defendant to

properly cross-examine either Richard Perkins or Officer Curole. The Court will recall, the direct conflict in testimony given by these two witnesses as to what occasioned Mr. Perkins to come forward. It was the District Attorney's position that he was not required to disclose information in the possession of the Police Department, but only his office. To the contrary, the District Attorney represents the State of Louisiana and as such, he had an obligation to present all facts within the State's province. We received a response to that, sir, the next day. In which, in response to Roman Numeral 2 Paragraph B, the State said, and I quote, "The State had no possession, no information in its possession pertaining to the alleged reward. Defense Counsel had other avenues available to him in regard to obtaining information about this reward. In fact, the Defendant had the opportunity to

[p.25]

cross-examine the witnesses about the reward and did so at trial."

Q Has that been marked as Petitioner's Exhibit No. 9?

A Yes, sir.

Q And was that filed on or about June 18, 1985?

A Yes, sir.

Q Now, sir, we have provided to the Court copies of certain audio tapes that were made. My question

to you is, prior to trial, did the State inform you that they had audio tapes of meetings between Mr. Perkins and representatives of the Liuzza family that were recorded by the New Orleans Police Department in which Mr. Perkins asked representatives of the Liuzza family for their quote "help," if he quote "helps" them.

BY MR. SOLINO:

I am going to object to that, that's a characterization of testimony, and I leave it to the trier of fact to read it and draw his own conclusions.

BY THE COURT:

The Court is going to listen to the tapes and read the transcripts. The Court is going to overrule the objection.

BY THE WITNESS:

No, sir, we were not provided with the transcripts.

EXAMINATION BY MR. COONEY:

Q Were you told that the prosecution had copies of any audio tapes?

A No, sir.

Q Have you been told by prosecutors at any meetings between any of their trial witnesses and

[p.26]

Representatives of the Liuzza family?

A No, sir.

Q When did you first learn of the existence of those tapes?

A A couple of -- a week or so ago, you sent me copies of the transcripts, I believe.

Q I would like to direct your attention to the transcripts that the Petitioner has prepared of those tapes which have been marked as Petitioner's Exhibit No. 12 and Petitioner's Exhibit No. 13. Petitioner's 12, is Captain Curole Tape 1, Bill Brown, general manager and Perkins starts at 4:20 p.m. For the record, Tape 2, Petitioner No. 13, the head of tape 2, Bill Brown, Ray Liuzza, Sr., Gregory Dawson and Perkins starts at 9:20 p.m. Do you have them in front of you?

A Yes, sir.

Q Now looking at those transcripts, Mr. Couhig, do you find any material in those transcripts that would have been useful to you to impeach Mr. Perkins?

A Yes, sir.

Q And can you describe what you found in those transcripts that would have been so useful?

A In general it seems to me there was an inquiry of Mr. Perkins seeking some assistance or help in exchange for his testimony. In particular, and I have not listened to the tapes, I'm working, sir, off the transcripts you have provided to me. There

seems to be colloquy between the two or among the people throughout

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and I don't want to mislead the Court, it's not throughout as in every sentence, but throughout, scattered throughout the various documents, questions concerning help that could be provided or mutual assistance. I think again, that's the type of thing that would have allowed the Jury to more reasonably gauge the credibility of Mr. Perkins.

Q Can you identify some of those just as examples of the colloquy between Mr. Brown and Mr. Perkins.

A Yes, sir. On Petitioner's Exhibit No. 12, under what's been labeled Tape 1, counter 25.5, is a BB, which appears to be the statement of Bill Brown, General Manager, as he talks to Mr. Perkins. How can we help you.

Q And before that, does the transcription of Mr. Perkins say I don't mind helping them catch him, you know, but I would like him to help me and, you know, I'll help him.

A Yes, sir.

Q Any other examples that you can readily find? I would like to direct your attention to Counter 54 and 50?

A Yes, sir, on Page 3. And again it appears to be Mr. Perkins. It's all right, you know, as long as I know you all are on my side and everything, I'm going to

help you all. BB, Brown, like I say, we're on your side, we want to try and help you.

Q How about Counter 122?

[p.28]

A Actually I start further in, sir, 119. Mr. Brown says, like I say, it's strictly between me and you and this room because when I do get Mr. Liuzza down here, when you get back with your friend, I'll be able to tell him, well, this is Richard, and he wants to help you. And Richard says, I want him to help me. And Mr. Brown says, I know, he will appreciate it. And then on Page -- counter 122, Richard says, you know, everybody up in there figures it's behind the reward that he has, you know that, but hey, we're poor, you know. I ain't gonna say my mama couldn't use nothing like that, but I rather, you know, come to the man. I coulda went, you know, I went to -- like they called homicide. I talked to homicide, but she seemed like she figured I was lying or something, I don't know, you know, but she never called me back.

It would have been certainly worth the discussion at the trial, and perhaps probative to have questioned the homicide people as to why they initially declined to follow this lead, or if indeed Mr. Perkins was telling the truth at that point.

Q That the homicide detective, in fact, according to Mr. Perkins, had concluded that he was lying and was only after the reward money.

A Yes, sir. And, again, Counter 171, Mr. Perkins, I wouldn't want to give that information to Crimestoppers, you know, I know one thing, they get that information and just some stuff,

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and I would rather see you all with it and you all help me. And then again, in the second tape, where -- apparently a Mr. Gregory Dawson, and the first time I heard of Mr. Dawson, sir, is when you sent me these transcripts. Apparently, Mr. Dawson had some conversations with Mr. Liuzza and Mr. Perkins and Mr. Brown. And it would have been helpful, frankly, to have been able to question Mr. Dawson either on the stand or through an investigator or what-have-you or personally. One of the things that we found out as a result of the work that you all did, is that they had these conversations with Mr. Liuzza. Knowing Mr. Liuzza, there's no doubt in my mind he would have told us the truth if we would have asked him the question. Frankly, we did not ask him that question at trial. We felt it was a painful time for him. I think the record will reflect that we did not feel it appropriate to even put him on the stand. But if we had known that he was involved actively in the investigation in order to fullfil our obligation to our client, we would have had to ask him what went on. And Mr. Liuzza would have told the jury.

Q Would it be fair to say in making your decision about whether or not to pursue that line of inquiry to Mr. Liuzza, you relied upon the representations made to you by the State?

A Absolutely.

Q Sir, I would like you to next take a look at what

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has been marked as Petitioner's Exhibit No. 14, which is a Crimestoppers report, it says 292 in the upper right corner.

A Yes.

Q Did you receive a copy of that document prior to trial?

A No, sir.

Q When was the first time you saw a copy of that document?

A When you sent it to me.

Q Did you find anything in that document that would have been useful for impeachment purposes?

A Yes, sir. The physical descriptions of Mr. Thompson is inconsistent when he appeared at the time of the trial, it has been ten years. The haircut was inconsistent. The other thing that would have been important is the motive of the person who actually filed the report. Crimestoppers had a program in which they gave a reward and, again, I think that that's a fine program, but it's important for the Jury to understand and be able to evaluate that information.

Q If you had gotten the tapes that you identified that Mr. Perkins or his representative, Mr. Dawson, had contacted Crimestoppers and you had also gotten this document, would you have asked Mr. Perkins whether he was responsible for that particular call to Crimestoppers?

A Absolutely. And, again, it goes back into the veracity of Mr. Perkins.

Q You would have asked Mr. Perkins whether he put

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in for a reward through Crimestoppers; is that right?

A I would have asked him and then when he would have said no, and then when I would have taken this document and I would have taken the other documents and demonstrated them to the Jury that he was unworthy of belief.

Q Mr. Couhig, I would like to direct your attention to what has been previously marked as Petitioner No. 15, which it says at the top, New Orleans Police Department, Criminal Investigation, Homicide Division, Wednesday, January 16, 1985 and it's a statement of Richard Alphonse Perkins; do you see that?

A Yes, sir.

Q Did the prosecutor provide you with a copy of that document prior to trial?

A I don't believe so, sir.

Q When was the first time that you saw that document?

A To the best of my recollection, when you sent it to me last week.

Q Is there any information in that document, sir, that would have been useful to the Defense in impeachment?

A On the issue of the reward, sir, it indicates that he had talked with Mr. Liuzza, that would have been information that I could have used at the trial.

Q Was there any information in that statement as to the relative culpability of Kevin Freeman that would have been useful to you?

A Yes, sir, as the Court will recall, the State's

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Position was that Mr. Freeman appeared to be a tagalong, as it were, and they reduced the charges against him to second degree murder, if he testified at the trial. This would appear to inculpate him equally if not more than Mr. Thompson if we are able to believe the statement itself. I don't know whether the statement can be believed because of my concern as to whether Mr. Perkins can be believed. But, if one takes it at face value, it at least provides us with additional ability to cross-examine Mr. Freeman.

Q Do you recall whether Mr. Freeman was allowed to plead in this case or whether he went to trial?

A The position was that they had agreed to reduce the charge to second degree murder and during the course of the trial Mr. Dubulier -- excuse me, at the conclusion of the trial, Mr. Dubulier argued that you could trust Mr. Freeman because he didn't really have much of a bargain, after all, he was merely going to be tried - I mean, he was going to be tried for second degree murder which could result in a life sentence.

Q Mr. Couhig, I would like to direct your attention to the document which has been marked as Petitioner's No. 16, which is Mr. Perkins' Grand Jury testimony.

A I don't have it, sir.

Q Mr. Couhig. did you see a copy of that document prior to trial?

A No, sir.

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Q Directing your attention to Pages 6 and 7, is there anything in that document that would have been useful to you in impeachment at the trial of John Thompson?

A Yes, sir. This is the first time I have read it. I apologize, but as one looks at the bottom of page 5, it talks about Mr. Perkins' going forward to testify. Excuse me, to give information, going to see a

woman about it, and asking her to get in touch with Mr. Liuzza so that -- and then it talks about calling Crimestoppers. It seems like they wouldn't do nothing about it, they would just wait, I don't know what they were waiting on, you know, the information would have been important to me as to why Crimestoppers was not interested in pursuing this. You can see one of the Grand Jurors asked a question, you called Crimestoppers? Yes, a friend of mine, you know, was helping me with it. He called them and he talked to them, you know, and I would be very curious as to who that friend was and what was the purpose of having a friend do it for him in dealing with the Crimestoppers.

Q Did the fact of his contacting Crimestoppers had any significance to you?

A Yes.

Q Because he was putting in for a reward; is that correct?

A Yes, sir, I'm sorry, I was reading this at the same time.

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Q I would like to direct your attention, if you would, to Petitioner's No. 17, which is Detective Curole's police report.

A Yes, sir.

Q Did the prosecutors produce that to you prior to trial?

A We got a -- the Court may recall this better that me, but it seems to me we got a preliminary report of some fashion, perhaps even extracted in some fashion, but we did not get this total report, that I'm confident of. And I'm not 100% confident that I got anything, but I want to be absolutely candid with the Court.

Q When was the first time you saw this particular document?

A A week ago.

Q Let me direct your attention to Pages 20 and 21 of that document, if I might, and I would ask you to look over that and tell me if you received that information prior to trial?

A No, sir.

Q Now, sir, on Pages 20 and 21, does it show multiple attempts to pursue the reward channels by Mr. Perkins?

A I'm sorry, ask me the question again.

Q Let me back up. Looking at Pages 20 and 21, what would be the significance of that information to your impeachment?

A A couple of things, sir, first of all, you've got Frank Maseli calling to the police. I've known Mr. Maseli, he was apparently calling about this fellow going -- and it turns out to be

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Perkins going to talk to the Liuzzas and he wanted personally to get in touch with them. He apparently met with him, if you look at the bottom of Page 21, and he met with a Mr. Brown. He then talked about additional conversations with Mr. Brown and that he would bring a friend of his so he could identify, and this is on Page 22, as an insurance man with him so they could speak to Mr. Liuzza. To my mind, the question, the obvious question would be why were they speaking to Mr. Liuzza or Mr. Liuzza's representatives as opposed to the police. I think the Jury would have that same question. From a practical standpoint, we attempted to interview all of those who would have given us or who did allow us to talk to them and while there is no assurance that Mr. Maseli or Mr. Brown or Mr. Liuzza would have talked to us, to have known about it, would have allowed us at least to have an even playing field to find out what was going on.

Q Would it be fair to say that this document showed you that Mr. Perkins' first contact with the detectives was at the International Hotel through the reward process?

A Yes, sir, and again, sir, I think perhaps even more -- to get away from the finding of the truth for a moment and get, which I think this goes directly to, but getting to the trial itself. We had a man take the stand and absolutely tell the Court and the Jury that

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he wasn't getting a reward, hadn't shown any interest in a reward and only comes forward because the police had come to him. We had the District Attorney argue that this was a man of great credibility. In effect, a citizen who was just doing his job. Who beat that into the ground, both in their opening, closing and rebuttal closing. This -- they would not have been able to do that, I don't believe, in my experience, given this, because what would we have done with this, Mr. Perkins would have been on the stand, the questions would have been very direct, have you talked to people about a reward, if he said as he did at the time of this trial, no, we could have confronted him with this and just as importantly this is the type of information that would have led to the development of the other. Any of these one elements could lead to the development of the evidence, all of the evidence. All of them together would have made it, I think, I can't comment on the District Attorney's case, but I can comment that from our perspective, it would have allowed us to do a great deal of damage to Mr. Perkins' credibility.

Q Okay, now, in this, Detective Curole says that Mrs. Parson (spelled phonetically) had told him that Perkins had spoken to homicide detectives that they believed he was only interested in a reward and was not telling the truth. So, the first thing you did, according

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to this report, was go to Crimestoppers and the Crimestoppers people found that he was only interested in a reward and wasn't telling the truth, wasn't worth pursuing; is that right?

A That's how it reads to me, and I think that would be, you know, that's the type of thing you would be interested in asking the person who took the report.

Q So the next thing this report says is that Perkins goes and meets with Ms. Parson twice on the 13th; is that right?

A It appears to be, yes, sir.

Q And then Ms. Parson arranges for meetings with or at least an initial meeting with the Liuzza representatives at the International Hotel on the 16th?

A Yes, sir.

Q And then there's a follow-up meeting with the Liuzzas at the International Hotel also on the 16th?

A Yes, sir.

Q And Mr. Perkins has testified both on cross and on direct that his first contact with the police was the police coming to his home; is that right? His testimony?

A I'm sorry, I'm reading something, sir, that would have been pertinent at the trial. On Page 20, it says the caller then informed Ms. Parson that the man that shot Liuzza stole his wallet which contained several credit cards, but no money, a watch and a ring. It would have

[p 38]

been important for us to have talked to Ms. Parson and found out what she knew about this fellow, why he came up, what her impression was, you know. As you get this, and as the State is aware, and the trial counsel, this is just the type of thing that just leads to other discovery of things that -- if you're gonna put up the guy and claim that he is worthy of belief and there's no challenge to his veracity, you have to have all of this sorted out. I'm sorry, you had a question, sir.

Q Let me back up and direct your attention to Page 23 of this, where it describes how Mr. Perkins comes into contact with the New Orleans Police Department detectives, do you see that?

A Whereabouts?

Q First full paragraph and second full paragraph on Page 23 of this report.

A Yes, sir.

Q And in that Detective Curole describes that basically Mr. Perkins comes to the hotel, meets with Mr. Brown and Mr. Brown introduces Mr. Perkins to the police officers; is that right?

A Yes, sir.

Q How did that square with Mr. Perkins' testimony at trial as to how be came into contact with the police?

A It's directly contradictory.

Q If you had had this information, all of this information that we have now shown you that you were not produced prior to trial by the

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State, how would that have effected the way you went about this trial?

BY MR. SOLINO:

I'm going to object to the speculation.

BY THE COURT:

Overruled.

BY THE WITNESS:

I think it's an axiom of trial practice that if one side is going to rely heavily on the credibility as they did in this case on Mr. Perkins' credibility and Mr. Carr's credibility and you have the ability to attack successfully their credibility, it calls all of what they have to say in question. And given the magnitude of this, it's a fair surmise that it would have, I think, cast a fall over their entire case.

EXAMINATION BY MR. COONEY:

Q Now, sir, shifting to Kenneth Carr for a moment, were you familiar with the testimony of Mr. Carr?

A Yes, sir.

Q What was Mr. Carr's role?

A Mr. Carr claimed to be an uninterested, disinterested, nothing to gain witness who happened to be at a bar by himself on New Year's Eve. That during the course of three-and-a-half hours he had two beers and overheard Mr. Thompson claim to have acknowledged killing Mr. Liuzza.

Q Now, do you recall if Mr. Carr said anything on the stand with regard to the issue of reward?

A Yes, sir.

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Q And directing your attention to Pages 201 and 202 of the transcript, would you read that, please.

A "Mr. Carr, my name is Rob Couhig, we met yesterday. You're familiar with the fact that Mr. Fanning and I represent Thompson, are you not?

Answer: Yep.

Question: Tell me about the reward you heard abou'?

Answer: From whom?

Question: From whomever you heard about it.

Answer: I didn't hear from anybody no reward.

Question: I thought you mentioned something about a $15,000 reward?

Answer: Yeah, I heard it from the guy over here talking about it.

Question: Other than that, you've never heard about that reward?

Answer: No.

Question: You made an application for it?

Answer: Oh, I heard it on the news a couple of times, yeah.

Question: And you heard about it prior to overhearing this conversation?

Answer: I don't know which one I heard first."

Q Thank you. Now, sir, I would ask you to direct your attention to what has been marked as Petitioner's Exhibit No. 18, which in the upper right-hand corner says No. 295, it's a Crimestoppers report?

A Yes, sir.

Q Did you see a copy of that document prior to trial?

A No, sir.

Q Do you see down on the next to last line where

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it says, does the informant with to remain anonymous?

A Yes, sir.

Q Is there an address and a name?

A Yes, sir.

Q Could you tell us what that address and the name says?

A It gives the address of [redacted] Ken Carr, off at 4 p.m., home after 4:30, works [redacted]

Q Does this at least look on its face like a Crimestoppers' report of the call from Kevin Carr?

A It appears to be.

Q Can you -- did you receive a copy of this prior to trial?

A I don't believe so, no, sir.

Q When was the first time you saw that?

A With the information you provided to me last week.

Q Does this document contain any information that would have been useful to you for impeachment purposes?

A Yes, sir.

Q What's that information?

A Well, the description of Mr. Thompson, the phraseology where he says -- No.2, John, don't crack on me. To my knowledge, they always called him not, not John, which would have been just a little something, but when you're challenging credibility, then, of course, the whole issue of the reward, which is in direct contrast to Mr. Carr's statement to me at

[p.42]

trial that he did not know about a reward and did not apply for one.

Q I would like you to focus on what has been marked as Petitioner's Exhibit No. 19, which is the police report dated January 6, 1985, the statement of Kenneth Carr. Do you see that document?

A Yes, sir.

Q Did the State provide you with a copy of that document prior to trial?

A I don't recall.

Q When was the first time you recall seeing that?

A My first recollection is in the past week.

Q Now, does this report contain information about the conversation which Mr. Carr supposedly overheard that is consistent with Mr. Carr's trial testimony?

Let me phrase it a little bit differently. Mr. Carr testified --

A Yeah, I'm sorry, I'm reading it out so that -- there's numerous -- if you look simply on the first page, the question, how would you relate to me, would you relate to me what you know of this incident. It's much more detailed and it talks about there being a big reward out which was not mentioned in the other. And then the next question where he actually uses hearsay to reinforce his impression or alleged impression.

Q Mr. Carr testified at trial about a conversation he overheard; is that correct?

A Yes.

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Q Is that the substance of what he provided?

A Yes.

Q Have you had an opportunity to compare whether the words he said he overheard in the statement and the Crimestoppers' report and in his trial testimony are consistent?

A They are inconsistent throughout.

Q Finally, I would like to have you refer to what has been marked as Petitioner's Exhibit No. 20, which is an affidavit of Ken Carr.

A I have it, sir.

Q Focusing on Paragraph 3 of that affidavit would you read that into the record, please.

A "After contacting detectives about overhearing a conversation in a bar, they came to see me and they took a statement. The detectives told me if I testify for the prosecution, I could collect the entire $15,000 reward offered by the victim's family and he asked me if I was interested in collecting the $15,000. I told them that I was not interested in the reward, and they said if I didn't come and testify that they would subpoena me. The four detectives then came to my apartment three times a day for a week and they have tried to convince me to testify. After the trial I was contacted to go to the victim's father's hotel to discuss the reward money and I was given $3,500 in cash and was told not to tell anyone about this. I then had to sign a paper saying I got the money and was told to keep quiet and the paper was

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then placed in a safe at the hotel."

Q At any time prior to my providing you with a copy of that affidavit, did the State disclose that information to you?

A No, sir.

Q If you had had this information that you now have at the time of trial, how would that have effected the way you proceeded?

A Again, Mr. Carr was presented, Mr. Dubulier and Mr. Williams referred to him as a disinterested witness who had overheard this statement. I think if you read the transcript of my closing argument, my position was the man was not credible just on its face. The circumstances that he related that he had been sitting by himself as it were for three or four hours in a bar on New Year's Eve having two beers overhearing this conversation. You then put into that context the potential of the reward and the fact that he knew about the reward and I think it damages his credibility considerably.

Q Mr. Couhig, you were trial counsel in this case, and obviously invested a lot of time and sweat into it, and now you see some documents that haven't been produced to you, what is your reaction to what you see in front of you now?

BY MR. SOLINO:

I object to his reaction.

BY THE COURT:

Sustained.

BY MR. COONEY:

Your Honor, we would tender Mr. Couhig and also move

* * *

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A No, there was one other.

BY MR. TRENACOSTA:

No further questions.

RECROSS-EXAMINATION BY MR. SOLINO:

Q Judge, I obviously have to ask a follow-up question. You worked on this case with who?

A With my partner, Detective Dema.

Q Do you have any knowledge that Detective Dema engaged in the activities indicated in this affidavit?

A No, I'm certain that he didn't.

BY MR. SOLINO:

Thank you. No further questions.

BY THE COURT:

Any further need for Captain Curole?

BY MR. TRENACOSTA:

I don't think so, Your Honor.

BY THE COURT:

All right. You will be excused. Thank you very much. It was good to see you.

Call your next Witness.

BY MR. TRENACOSTA:

We would call Richard Perkins.

RICHARD PERKINS called as a witness by the Defense, after being first duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION BY MR. TRENACOSTA:

Q Mr. Perkins, would you please state your name for the record.

A Richard Perkins.

Q Mr. Perkins, I'm Nick Trenacosta, we've met this

[p.95]

week, haven't we?

A Yes.

Q Did you or do you go by a nickname ten years ago, or do you now --

A What, say that again.

Q A nickname. Is there another name that people call you?

A Yaah.

Q And what is that, please?

A Funk.

Q All right. We know we're talking to the right person. Did you testify at trial when Mr. John Thompson stood trial for the Liuzza murder?

A Yes, sir.

Q Did you go to the Liuzza family to give them information about the case?

A Not really about the case, but to clear myself.

Q Did you tell the Liuzza family that you had some information that might help solve this case?

A Yeah.

Q Did you go to the hotel where Mr. Liuzza worked or owned?

A Yeah.

Q Do you remember how many times you visited the hotel?

A About three times.

Q At the first meeting, the first time you went there, were you alone?

A Yeah.

Q Do you remember meeting with Bill Brown?

A The second meeting.

[p.96]

Q Who did you meet with at the first meeting?

A There was somebody at the front desk.

Q Do you remember giving a statement to the police at the International Hotel?

A Yeah.

Q Before the trial, did you meet with the District Attorneys on the case to go over your testimony?

A Not to go over the testimony, it was Kojak they had in the office.

Q Kojak, Kevin Freeman. What did you all discuss with the District Attorneys?

A I don't remember what we discussed.

Q Did a discussion come up about a reward?

A They mentioned something about it.

Q Do you remember what they said?

A Said something about you're entitled to one.

Q The District Attorney?

A I told them I wasn't there for the reward, but they told me you were entitled to some reward.

Q Did you get the reward then?

A No.

Q What did the District Attorney tell you about it?

A They just said that you will receive a reward, you know, after the trial.

Q I see. Did you get a call or did anybody contact you about the reward at any time?

A It was about a month or two after the trial.

Q What happened then?

A Somebody just called me. They didn't say it was about the money, they just say come down that they wanted to talk to me.

[p.97]

Q Come down where?

A To the hotel.

Q And when you got to the hotel, what do you remember happening?

A I just remember somebody coming out of the back room with some money.

Q Did you receive any money?

A Yes, sir.

Q How much money did you receive?

A Ten-O-Five.

Q Is that $10,500?

A Yes.

Q Was it a check?

A Cash.

Q Was it in small bills or 100s?

A 100s.

Q Were you asked to sign any papers when you received this money?

A Just stating that I got it.

Q Do you remember if anything else was said?

A No.

Q Do you remember if the person who gave you the money asked you not to talk about getting the money?

A It was a possibility.

Q Do you remember the prosecution, the District Attorneys ever telling you not to talk about the money?

A Yeah.

Q One more question. At the trial, you testified that you had been working at the Hilton Hotel. Do you recall that?

[p.98]

A Uh-huh.

Q How did you get the job at the Hilton Hotel?

A Mr. Liuzza. He recommended me.

Q He recommended you for the job?

A Yes, sir.

BY MR. TRENACOSTA:

No further questions.

CROSS-EXAMINATION BY MR. SOLINO:

Q Mr. Perkins, at any time in your involvement with this case, did anybody ever tell you to lie?

A No.

Q Prior to your appearing at trial, do you remember testifying at trial?

A Yes.

Q Before the day you testified at trial, did you receive any money from anybody?

A No.

Q Did you ever go and meet anybody from Crimestoppers and receive any money?

A No, sir.

Q Do you remember who it was that gave you the cash after the trial?

A It was about a month after, Bill Brown and Liuzza and some other guy.

BY MR. SOLINO:

No other questions, Judge.

BY MR. TRENACOSTA:

One moment, Judge. No further questions.

BY THE COURT:

Let me ask you this. Do you know before the trial, did anybody pick up any money on your behalf from Crimestoppers?

* * *

TRIAL EXHIBIT #76

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

CASE NO. 305-826
SECTION "B"
VIO: LA R.S. 14:30.1

STATE OF LOUISIANA	)
	)
VERSUS	)
	)
JOHN THOMPSON	)
	)

* *

TRANSCRIPT OF THE TESTIMONY TAKEN DURING THE HEARING HELD PRIOR TO THE TRIAL, AND THE OPENING STATEMENTS AND TESTIMONY TAKEN DURING THE TRIAL IN THE AFORESAID MATTER, HELD ON MAY 7th, 2003, BEFORE THE HONORABLE PATRICK G. QUINLAN, JUDGE PRESIDING.

* *

APPEARANCES:

FOR THE STATE:
VAL SOLINO, ASSISTANT DISTRICT ATTORNEY
SHARY SCOTT, ASSISTANT DISTRICT ATTORNEY

FOR THE DEFENSE:
ROBERT GLASS, ATTORNEY AT LAW
GORDON COONEY, ATTORNEY AT LAW
MICHAEL BANKS, ATTORNEY AT LAW

REPORTED BY:

MONIQUE M. CASEY, OFFICIAL COURT REPORTER
CRIMINAL DISTRICT COURT, SECTION "B"

CHARLENE W. FAUCHEAUX, OFFICIAL COURT REPORTER
CRIMINAL DISTRICT COURT, SECTION "B"

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* * *

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and satisfy yourself that you know what's there, rather than having to hand, to hand, to hand in the jury box for each individual to look at.

So with that y'all can now get up and take as much time as you need, satisfy yourself you understand what's there.

[JURY VIEWING STATE'S EVIDENCE]

BY THE COURT:

For the record, does the state have anything else at this time?

BY MR. SOLINO:

The people rest subject to rebuttal.

BY THE COURT:

Defense ready to proceed?

BY MR. GLASS:

We are, Your Honor.

BY MR. BANKS:

We are, Your Honor.

BY THE COURT:

Call your first witness.

BY MR. BANKS:

The Defense calls Sheri Kelly.

BY THE COURT:

Come up over here, ma'am, please.

AFTER BEING DULY SWORN
SHERI KELLY
TESTIFIED TO THE FOLLOWING
-- DIRECT EXAMINATION--

EXAMINATION BY MR. BANKS:

Q. Good afternoon, Ms. Kelly.

A. Good afternoon.

[p.56]

Q. Would you tell us your full name, please?

A. My full name is Sheri Kelly.

Q. Where do you live, ma'am?

A. I live in Hammond, Louisiana.

Q. How long have you lived there?

A. Since September of 2001.

Q. Where did you live in December of 1984 when Mr. Liuzza was killed?

A. I lived in New Orleans at Josephine and Baronne on the corner.

Q. And would you turn your attention to this map we have over here? We have a map that I believe shows the corner of Josephine and Baronne. Can you just point to where -- you said -- were you in an apartment?

A. Yes, sir.

Q. Okay. Can you show us on this map where the apartment was?

A. My apartment was right here.

Q. Okay. And did it front on to Josephine or Baronne?

A. The front of the apartment was on Baronne.

Q. All right. I'm just going to put an SK on your apartment, is that all right?

A. Yes, sir.

Q. When did you move into that apartment, ma'am?

A. The first week of October.

Q. October of 1984?

A. Yes, sir.

Q. Would you describe the layout of the apartment?

A. The front of the apartment was a living room in the kitchen, then there was a little partition then the bedroom, and the bathroom was

[p.57]

over toward the side here, and a balcony up front.

Q. Okay. So let me just try to get the location of the balcony. Would you just -- with the pointer maybe -- show me where the balcony was?

A. Right through there.

Q. Okay. Did it front out onto Baronne this way?

A. Yes, sir.

Q. All right. I'm just going to draw that in. Would you tell me if that's accurate? Is that about where the balcony was?

A. Yes, sir.

Q. I know it extends beyond the building, but it's more in the front here?

A. Yes, sir.

Q. Okay. After December the 6th, 1984, did you stay in that apartment for very long?

A. I was out by the first of the new year.

Q. Okay. So you moved in, I think you said in October of 1984 and you were gone just a couple months later by new years, is that right?

A. A few weeks.

Q. We've heard in this case that Mr. Liuzza was killed early in the morning on December the 6th at about 12:30 a.m. Where were you that night, ma'am?

A. I was in my bed reading.

Q. At about 12:30 you were reading?

A. Yes, sir.

Q. Did you have from your bedroom any windows looking out onto either Baronne or Josephine?

[p.58]

A. In my bedroom the windows look out on Josephine.

Q. Okay. And then how about the balcony, the balcony looked out on Baronne?

A. On Baronne.

Q. Did there come a time that evening when you heard any voices or anything unusual that caught your attention?

A. Yes, sir. I heard an argument, or what sounded like an argument.

Q. And argument between two men?

A. Yes, sir.

Q. Was it loud or soft?

A. It was loud.

Q. Was there anything about that argument that got your attention?

A. The yelling, the intensity.

Q. Okay. Let me ask you this, before you heard the argument did you hear anyone running, any footsteps before the argument?

A. No, sir.

Q. How long did the argument last, do you remember? I know it's a long time ago.

A. I don't recall how long it lasted. It was yelling.

Q. Did you do anything after hearing the men argue?

A. When I realized I was hearing a very loud discussion, argument, outside I sat up, turned my light off and was moving -- going through my living room to see if I could see what was going on.

Q. Could you show us with the pointer how you were moving?

A. The bedroom was here; I was going straight out that

[p.59]

way.

Q. Towards the balcony?

A. Towards the balcony, that was the direction.

Q. Why did you turn the light off before you started walking out to the balcony?

A. Well, I didn't want to be seen. I was afraid of bullets. I didn't know what to expect.

Q. Did you hear bullets?

A. I did hear bullets.

Q. Tell us how many shots you heard?

A. As I was coming across the floor of my living room and throwing up the window I wasn't quiet, I heard two bullets -- two shots and then a series of shots a split second later. Two shots.

Q. Could you actually see the shooter firing a shot?

A. No, sir.

Q. After you heard the shots where did you go?

A. Sir?

Q. After you heard the shots where did he go? Did you continue walking to the balcony; did you go back into the apartment?

A. Well, I was on the balcony at that point after the shots.

Q. Now, by this time when you were on the balcony were your lights on or off?

A. They were off.

Q. What's the first thing you remember seeing after you heard the shots?

A. It was like I saw two things at the same time. I saw someone laying across the street on the sidewalk and I saw someone else

[p.60]

running.

Q. Yesterday, I know you weren't here then, but we saw -- or we placed an "X", a blue "X" over there. Is that about where you saw a man lying on the sidewalk?

A. Yes, sir.

Q. Okay. And did you later learn that that was Mr. Liuzza?

A. Yes, sir.

Q. Now, you said you saw a man running?

A. Yes, sir.

Q. Were you on the balcony at the time?

A. Yes.

Q. Where did you first see the man? Where was he when you first saw him? Would you touch that with the pointer?

A. Probably he was approaching the curb, or had stepped up on the curb.

Q. Okay. I'm going to -- if you could touch as close as you can to where you think that was, I'm going to put another running figure up there. Okay. Right around here? All right pull that back. I'll try to press that on a little better than I did yesterday.

Okay. Ignore the directions, ma'am, but the runner was going in what direction?

A. He was going towards Dryades.

Q. What did you see next?

A. I looked back and saw that someone was with the person on the ground and then I looked back at the runner.

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Q. Did you see the runner then a second time?

A. I saw the runner.

Q. Where were you when you saw the runner the second time?

A. I was at the very edge of my balcony facing Baronne.

Q. How close did the runner pass to the end of your balcony?

A. Maybe within ten feet.

Q. Okay. And you were one level above on the balcony?

A. Yes, sir.

Q. So you were looking down at a man who passed within about ten feet of you?

A. Yes, sir.

Q. Looking down at the man from the balcony, could you tell exactly how tall he was?

A. He appeared to be taller than I was.

Q. How tall are you, ma'am?

A. I'm 5'6".

Q. But you couldn't tell whether he was 5'10" or 6' or 6'2" or anything like that?

A. No. No.

Q. That's because you were above?

A. I was looking down, yes.

Q. Is there anything you did see about him, though, from where you were that you could tell? Can you describe what you saw?

A. The gentleman that I saw had -- he appeared to be stocky and he had short hair. And he looked up and saw me.

Q. Was he wearing light clothes or dark clothes?

A. Dark, it was dark, dark clothes. It appeared to be

[p.62]

a jacket, a close fitting jacket like a blazer.

Q. You said he had short hair?

A. Yes, sir.

Q. Could you describe that a little bit more?

A. It was close-cropped hair that fit the shape of the head.

Q. Did you get a good clear look at his facial features?

A. No, sir.

Q. Did you see a moustache on his face?

A. No, sir.

Q. But you did see that he had close-cropped hair?

A. When he turned his head I saw that.

Q. Now, I think you said before that you thought the man saw you, is that right?

A. Yes, sir.

Q. Can you describe that a little more, how that happened?

A. I wasn't quiet when I came out on the balcony. And I looked. As I looked he looked up. I just know that he saw me.

Q. Did it look like you made eye contact?

A. I couldn't clearly see his eyes but it bothered me greatly.

Q. Why did it bother you?

A. Well, he had probably just shot someone and I was fearful.

Q. Did you get a sense with your lights out that he could tell what you looked like?

A. Well, he would know where I lived.

Q. Know that you lived in this apartment that I put an

[p.63]

SK on with a balcony looking out over Baronne Street?

A. It was fairly light because in certain areas -- but, I don't know what he saw of me, but it bothered me.

Q. Did you form any impression as to whether this man who ran by you was anyone you had ever seen before?

A. No, sir. I couldn't form -- I could have seen him before but I don' t know.

Q. Do you have any reason to believe that maybe you had seen him before?

A. I had seen a man on my front stoop the afternoon of the shooting.

Q. So that would be the afternoon of December 5th?

A. Yes, sir.

Q. Tell us what you saw that day?

A. There was a black gentleman standing on the porch that leads to the steps that would go up to my apartment. And when I drove up in my car he turned so that I couldn't see his face. So therefore I didn't stop. I went around the block again. I didn't know why a man was on my porch.

Q. That man that you saw on your porch on the afternoon of the 5th, his hair was what?

A. Short.

Q. Short?

A. Yes, sir.

Q. Short like the man you saw later, the man who was fleeing from the shooting of Mr. Liuzza?

A. It could have been, yes.

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Q. But you're not certain?

A. Not a hundred percent.

Q. Did you see a man like that at any time before the afternoon of the 5th?

A. I believe that I had seen the same gentleman a week or so before on the opposite corner, which is why it bothered me that I saw him the second time.

Q. Did that play any part in your mental state, your concern that you thought you may have seen him twice and he saw you as he was fleeing from the scene?

A. Yes, sir.

Q. After -- well, let me ask you this. Did the man continue running after you saw him the second time? From what you could tell when you last saw him was he stopping, or talking to someone, or running?

A. He was running.

Q. Okay. Can you just show us again the direction he was running when you lost sight of him?

A. He was running in this direction.

Q. And where did you lose sight of him?

A. Probably within five feet.

Q. Five feet of what?

A. The balcony, when you lean over so far -- not lean over, but when you look over so far once they cross the back of the house -- the side of the house.

Q. The balcony didn't wrap --

BY THE COURT:

Mr. Banks, I'm sorry.

[p.65]

BY MR. BANKS:

That's all right.

BY THE COURT:

I've got a phone call I have to take.

I'll be right back out, ladies and gentlemen.

[PAUSE IN PROCEEDINGS]

BY THE COURT:

Once again a doctor's office. I apologize. You can proceed.

BY MR. BANKS:

There are lawyers, judges, and doctors.

BY THE COURT:

That's right.

EXAMINATION CONTINUES BY MR. BANKS:

Q. Ms. Kelly, I can't remember exactly where I left off. Did I ask you, your balcony didn't wrap around onto Josephine?

A. No, sir, just on the front.

Q. After the man passed from your sight, after you saw him run up Josephine and you couldn't see him any more. What did youdo?

A. I looked back at the person on the street and I immediately turned around and ran into my apartment to put something on so I could go downstairs and see what had gone on if I could help. If there was anything --

Q. Did you go downstairs?

A. Yes, sir.

Q. When you got there what did you see?

A. Well, I saw a young man laying on the sidewalk.

Q. Did you know him?

A. No.

[p.66]

Q. Sitting here today telling you that that was Mr. Liuzza, did you know him or know of his name at the time?

A. No, sir.

Q. I think you had lived there two months, you said?

A. Yes, sir.

Q. Did you know many people in the neighborhood around that time?

A. No, sir.

Q. When you went down to the street, were the police there yet?

A. No, sir.

Q. Did the police arrive while you were down there?

A. Yes, sir.

Q. Did you talk to any policemen either down on the street or immediately after that?

A. I talked to the policemen on the street.

Q. And do you remember exactly what you told the police?

A. I can't remember specifically, no.

Q. After you talked to the policemen on the street, the same night?

A. Mmm-hmm [affirmative response].

Q. Did you have an opportunity to meet with any other policemen or detective?

A. Later that night or earlier that morning a policeman came to my door and wanted me to go out on the balcony to see if I could identify someone that they had brought in.

Q. They brought in a suspect?

A. In the -- yes, sir.

Q. From off the street?

[p.67]

A. In the street.

Q. Okay. Can you show us with your pointer where you were standing when they asked you to identify the suspect?

A. Well, once again I was on the balcony.

Q. Okay. And did they bring the suspect up to the balcony?

A. No, sir.

Q. Where did they bring him?

A. Probably about here. It was a few feet away.

Q. Okay. So in the middle of the block of Baronne Street?

A. Well, up in here, in the middle of the street.

Q. Do you know to this day the name of the man they brought back that night for you to take a look at?

A. No, sir.

Q. Looking at that man in the street from up on the balcony were you able to say one way or another to the policemen whether that was the man with the close cropped hair you saw run under your balcony or not, or whether it was someone else?

A. No, sir. I couldn't --

Q. Couldn't tell at all. Did you tell them that?

A. Yes, I did.

Q. Were there any other attempts by the police to see if you could help them identify the suspect after the night of the crime?

A. At some point two detectives came to my -- I still was on Baronne, I hadn't moved at the time.

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Q. So this would be between December 6th and January 1st?

A. Yes, sir.

Q. I'm sorry. Continue.

A. With mug books.

Q. Mug books. Just if we could explain to the jury, they probably know what that is, what do you mean when you say mug book?

A. The books that I saw were loose-leaf type binders with pictures of men that maybe I could look through and identify if I had seen the person.

Q. Can you describe what the mug books looked like, what color they were?

A. I believe they were blue, but I cannot be sure.

Q. And these mug books that they brought back to see if you could identify this man with close cropped hair, did they have one picture on the page, or a bunch of pictures on a page?

A. There were several pictures on the page.

Q. Was there writing under the pictures, the names, or you don't remember?

A. If they were, I don't remember.

Q. Did you look through the mug books or the books of mug shots with the detectives?

A. I looked through at least one.

Q. Did you say anything to the detectives about what you were looking for as you looked through these photographs in the book?

A. Well, yes, sir. I was looking for a man who had short hair.

[p.69]

Q. Why is that?

A. Because that's what I saw.

Q. Were you able to see anyone in these books of mug shots that you were able to identify?

A. No, sir.

Q. I think you said some time after the mug shots came back you moved out right before the first of the year?

A. Yes, sir.

Q. Why?

A. I was -- not knowing who that man was I needed to move. He knew where I lived. I was afraid.

Q. You said you talked to a police officer the night on the street?

A. Yes, sir.

Q. You talked to a detective who came to your house a few hours later who asked you to look at a suspect?

A. Yes, sir.

Q. And you talked to a couple of detectives some time in the next few weeks when you looked at mug shots?

A. Yes, sir.

Q. Did you tell anyone else during that period of time about what you had seen?

A. I told my sister and a couple of friends.

Q. What did you tell your sister?

A. I told my sister everything and that I was afraid. I told her everything.

Q. Did you tell her what you saw?

A. Yes, I did.

[p.70]

Q. Did you give your sister a description of the man who ran ten feet or so past your balcony?

A. Yes, I did.

Q. What did you tell her?

A. I told her he was a -- appeared to be a stocky man and he had short hair and he resembled -- could have been like the man that was on the porch and it bothered me.

Q. Did there come a time after you moved in January of 1985, when you learned that John Thompson had been arrested and charged with the murder of Mr. Liuzza?

A. I had read in the paper but I don't remember the day.

Q. I'd like to show you an exhibit I've marked as D7. D7 is an article from the New Orleans Times Picayune, or an excerpt, with a photograph from January 18, 1985. Have you see that before?

A. Yes, sir.

Q. Is that the newspaper article you were referring to?

A. Yes, sir, it is.

Q. Tell us where you were, please, when you saw that article?

A. I was a passenger in a car being driven down St. Charles Avenue.

Q. Do you think it was on the 18th of January or around that time?

A. It could have been.

Q. Do you think it was that day's paper?

A. It probably was.

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BY MR. BANKS:

Your Honor, I'd like to publish to the jury a blow up of the same exhibit if there's no objection.

BY MR. SOLINO:

Can we approach?

BY THE COURT:

Yes.

[COUNSEL APPROACHES THE BENCH]

BY MR. BANKS:

I'll withdraw my request to show that blowup based on the objection.

EXAMINATION CONTINUES BY MR. BANKS:

Q. But what I'm going to do instead is show a copy of the photograph, which I think, has been admitted into evidence and marked as D5. Can you see that, Ms. Kelly?

A. Yes, sir.

Q. That's the photograph that you saw in the newspaper although only from the neck up in the newspaper?

A. Yes, sir.

Q. What was your reaction when you saw the photograph of Mr. Thompson that was taken on December the 12th, 1984?

A. My initial reaction was this is not the man that I saw.

Q. That's the reaction you had in the car when you saw the newspaper article?

A. Yes, sir.

Q. And that was some time after you had moved in January of '85?

[p.72]

A. Yes, sir.

Q. You said it was your initial reaction. Did that reaction ever change?

A. No, sir.

Q. When you saw the article you were a passenger, I guess someone was driving?

A. Yes, sir.

Q. Did you say anything to the driver, did you comment in any way when you saw the photograph?

A. He may have.

Q. No, I'm questioning whether you said anything, not whether he did.

A. Oh. I was basically reading the article out loud saying, "This is not the man I saw."

Q. Did you tell your sister, to whom you had spoken before, after you saw the article?

A. Yes.

Q. What did you say to your sister?

A. I told her this is not the man that I saw that night.

Q. Were you sure at the time that that was not the man you saw that night who ran ten feet past your balcony?

A. Yes, sir.

Q. How could you be so sure?

A. Well, this gentleman here his hair is way too big. He seems to be a little more slender. You can see his Adam's apple. The man I saw just appeared much heavier.

Q. Who appeared heavier --

A. The man that I saw that night.

Q. I'd like you to take a look of the photograph that

[p.73]

we've blown up here. It's eighteen years later today. But I want to ask you, can you tell me, is it possible that that's the man you saw running by your balcony right after Mr. Liuzza was shot?

A. It is not.

Q. Are you certain of that?

A. I'm positive.

Q. At any time after you moved around January the 1st or shortly before that, did the police or detectives come and talk with you again?

A. Either the day before or the day I was actually starting to move, one of the detectives who had been there with the mug books did come by.

Q. I guess I asked my question badly. After Mr. Thompson's picture appeared in the paper --

A. Oh, no, sir.

Q. -- did the detectives or the police ever come back to you and show you that picture, or one like it --

A. No.

Q. -- or a lineup in person and say, "Is this the man you saw run by your balcony?"

A. No, sir.

Q. Why did you move on January the 1st or around that time?

BY MR. SOLINO:

I'm going to object.

BY THE COURT:

Sustained. I think she's answered that about three

[p.74]

times already.

BY MR. BANKS:

All right.

EXAMINATION CONTINUES BY MR. BANKS:

Q. When you saw the photograph in the paper -- I'll withdraw that.

Let me just ask you this, Ms. Kelly, this is the first time, isn't it, that you've been in court in front of a jury testifying in this case?

A. Yes, sir.

BY MR. BANKS:

I don't have anything further. Thank you, ma'am.

BY THE COURT:

Cross.

-- CROSS EXAMINATION --

EXAMINATION BY MR. SOLINO:

Q. Ms. Kelly, do you remember what the temperature was the night this happened, what the weather was like?

A. Specifically, no.

Q. Do you remember if it was hot or cold?

A. I don't remember.

Q. You don't remember if it was hot or cold?

A. No, sir.

Q. Do you remember if you typically slept with the windows open or shut?

A. I slept in a bedroom, which was several feet away from the window, and the window was cracked originally because I had a cat and his bathroom was on the balcony.

Q. Do you remember if it was opened or closed on this

* * *

TRIAL EXHIBIT # 97

FOR RELEASE:
December 17, 1984

CONTACT:
Thom Kolesa
Crimestoppers Coordinator
504/527-6964

[Handwritten note:
Copy for Homicide]

CRIME-OF-THE-WEEK

Crimestoppers is offering complete anonymity, plus a $1,000 reward, for information leading to the arrest and indictment of the man that shot and killed Ray T. Liuzza Thursday, December 6, near his home at 2022 Baronne Street.

Liuzza had just returned home at 12:40 a.m. He parked his car in the 1700 block of Josephine Street. As he was getting out of his automobile, a man approached and robbed him at gun point. Liuzza surrendered his valuables.

For no known reason, the attacker then fired at Liuzza. He was hit five times. Police were called immediately, and Liuzza was rushed to the hospital, where he died a short time later.

A nearby witness saw the event and heard the conversation between Liuzza and the killer, who was

described by police only as a black male, about 6 feet tall.

If you have any information that you believe can help the New Orleans Police Department solve this case, you are urged to call Crimestoppers, 822-1111.

Remember, you do not have to give your name, and you may be eligible for a cash reward of $1,000.

In addition to the Crimestoppers anonymous information reward of $1,000, a private reward fund of $15,000 has been set up for payment, one-half upon arrest and one-half upon conviction.

FOR IMMEDIATE RELEASE:

A reward of $15,000, to date was posted today for the arrest and conviction of the murderer of Ray T. Liuzza, an executive of the International Hotel.

Thirty-four year old Liuzza was robbed and fatally wounded early last Thursday morning (Dec. 6) by an unknown assailant, as he stepped from his car near his apartment at [redacted]

Half the money will be awarded to the person or persons providing information leading to the arrest of the felon; and the other half of the reward money will be given at the time of the conviction.

Anyone with information as to the identity of the assailant should call immediately Crimestopper Information (822-1111) or N.O.P.D. Homocide Division (826-5155). They need not identify themselves to earn the reward.

The fund was started by $5,000 in reward money posted by the Liuzza Family.

Contributions for the reward fund from friends and other concerned Citizens are pouring in hourly.

Ray A. Liuzza, the father of the victim said:

"This senseless crime, reminiscent of the recent Glapion and Posey killings, has shocked our entire community and started-inadvertently- a goundswell of support and positive action throughout the City.

"Together, every citizen, white or black, the affluent or those striving to lift themselves upward, the young and the elderly, must work together to make the streets of New Orleans safe once again."

"We must support our police department in every possible manner. Providing the necessary funds for adequate police protection must become the number one priority of every elected official and every private citizen.

"We grieve not only for the death of our son, but also for the fact that we live today in such violent times. Perhaps our consolation will be that Ray's untimely death may awaken all of us to seek a solution to the problems that beset out society."

Those who whish to contribute to the Ray T. Liuzza Reward Fund may mail checks to P. O. Box 57059, New Orleans, Louisiana.

/s/ Ray A. Luizza
RAY A. LIUZZA

Sworn to and subscribed
before me, notary, on
11th day of December, 1984

/s/ Joseph Maselli, Jr.
JOSEPH MASELLI, JR.
Notary Public

TRIAL EXHIBIT #98

Crime Stoppers Questionnaire #292

[Fold-out Exhibit, see next page]

CRIMESTOPPERS
822-1111

#292
Informant's Number

QUESTIONNAIRE

Type of Crime 30 Victim Lizzie

Location of Offense [illegible]
Date/Time of Offense

Suspect Number 1 John Thompson B/m 23 [illegible] "Nut"
Name Street Address/Location Hub Bldg Lang

Address/Location [redacted]

Vehicle Information
License Make Model Color Year

Suspect Number 2 [illegible] B/m 23 [illegible] "Kazak"
Name Street Address/Location

Address/Location [redacted]

Vehicle Information [illegible] Cherry [illegible] Bleeding [illegible]
License Make Model Color Year

Facts that place suspect on the scene - - - - - -

Witness
Name Address/Location

CIST: On [illegible] at about [illegible] Officer [illegible]
Date Time
received a call via Crimestoppers' line and learned that [illegible]
[illegible]

How did informant learn about Crimestoppers? [illegible] Radio Newspaper Other
Circle one Station

Does informant wish to remain anonymous? If No, get home/address/etc.

[illegible] [illegible]
Detective assigned Unit Date

DEFENDANT'S EXHIBIT
D-18

TRIAL EXHIBIT
#98

EX 001379

JA 797

TRIAL EXHIBIT #118

MEMORANDUM

TO: Harry Connick, District Attorney

FROM: John Jerry Glas, Appeals

DATE: May 10, 1999

RE: State v. John Thompson
306-526

==========

FACTS

1. The murder of Ray Liuzza was a high profile case.

2. Williams' boss, Eric Dubelier, was allowed to be a special prosecutor and the lead prosecutor in the Liuzza murder.

3. Williams was not the Senior D.A. in Section "B".

4. Williams was allowed to be a Special Prosecutor in the armed robbery trial.

5. Junior A.D.A. Deegan had never even been made a section leader; in fact, before April 1, 1985, he had always been the second junior in Section "B".

6. The Armed Robbery conviction was considered essential to getting the Death Penalty in Liuzza Murder Trial.

7. Dubelier wanted the armed robbery tried before the Liuzza murder trial.

8. Williams knew about the bloody pants/shoe.

9. Williams, in open court, requests that Thompson's blood be taken and tested.

10. On April 2, 1985, Dubelier answers the defendant's Motion for Bill of Particulars and the Motion for Discovery and Inspection. Nothing is said of any testing.

11. On April 3, 1985, Duberlier's answers are filed in court.

12. On April 4, 1985, Palm picks up bloody pants/ shoe for testing.

13. The testing of the bloody pants/shoe was expedited by someone.

14. On April 9, 1985, the examination is finished, the report is handwritten; typed; addressed to Whittaker; and placed in the D.A. pickup.

15. Whittaker received the report.

16. Whittaker placed the report on Williams' desk.

17. Junior A.D.A. Deegan saw the report.

18. Williams called the shots at the trial.

19. Williams does not question Jay Lagarde about bloody pants/shoe.

20. Junior A.D.A. Deegan only asks Crime Tech Cusimano about the gun and his pictures; not about the bloody pants/shoe.

21. Williams introduces 5 of the 7 pieces of evidence from the NOPD Crime Lab; he does not introduce the bloody pants and shoe.

22. Numa Bertel is never told by Whittaker about the bloody pants/shoe or given the crime lab report.

23. Williams writes Jury Trial Report, stating that there was "no corroboration" for the identifications.

24. Williams closes the D.A. file, signing the inside front cover.

25. The crime lab report is not in the D.A. file.

26. The crime lab report is not in the micro-filmed copies of the D.A. file.

27. Deegan confessed to Riehlmann that "he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant."

28. Williams tells Whittaker that he remembers Deegan starting to say something about blood

evidence but he told him "Whoah", indicating that he did not want to know.

JA 801

TRIAL EXHIBIT #137

State of Louisiana v. John Thompson

Transcript of Murder Trial

May 7, 1985
(Pages 1 to 254)

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* * *

[p.335 Excerpts of Closing Argument by Mr. Williams]

doubt, that Mr. Liuzza was the victim of an armed robbery, and he was killed during the course of that armed robbery. Property was taken from him, that has all been proven.

What is the issue in this case. When I argue a case, I always try to reduce the case to its lowest common denominator. What issue do you, the ultimate twelve people, that are going to have to decide this case, what issue do you have to decide. Obviously, it's not whether or not a first degree murder was committed. It's who did it. That's the sole issue for you to decide in the course of your deliberation. The state has produced evidence, and that evidence points to the fact that John Thompson, that man seated right there, is the man who did it. And, I'm going to go through that evidence for you.

You heard from Kevin Freeman, Ladies ad Gentlemen. Kevin Freeman was there that night. Kevin Freeman told you what happened in his own words. They want you to believe, through their cross-examination from Mr. Freeman, and through Mr. Couhig's argument that he just gave you, that Kevin Freeman perhaps is the person, that did the killing. Or, that Kevin Freeman is lying because he got a deal. Think back when he took the stand. What did he say

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the deal was? He said, that he would stand trial for second degree murder. He came here, and he admitted to you, that he knew what happened, that he was involved, and that the deal is, that he's going to stand trial for second degree murder. And, he's going to get up here, and tell another jury what happened because he doesn't think that he's involved. Is that a deal? Did we cut him loose. Did he come here, and say, I was allowed to plead guilty to manslaughter, and I got ten years, or I got a suspended sentence. No. He said, I will go to trial for second degree murder, which carries with it a mandatory life imprisonment sentence. Does that smell of a deal, that looks so ridiculous, that you want to disregard what he says? I would submit to you, no. And, what is the other deal that he could take, which he has not chosen? He was offered by the state, by the District Attorney's Office, to be able to plead as an accessory after the fact of a first degree murder. And, the maximum penalty in that case, Ladies and Gentlemen, is five years at hard labor. He has had that offer, and as yet, he has not taken that offer. So, did he get that kind of deal, that would make you think that he's coming in here only to protect himself? I submit to you, that no, no, there

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was no deal like that. So, I know, that you all listened to his testimony, and you all are going to be able to go back and talk about the effect of that deal, upon whether or not you believed his

story, the credibility that you assigned to his testimony. What did he tell you? Mr. Dubelier went through all of that. He said, that he was there, that he picked that man up. His car ran out of gas. They were walking down Josephine Street, when Ray T. Liuzza pulled up in his BMW. He said, about that time, is when that man pulled out this gun. He says, "I'm gonna hit him." At this time, Kevin Freeman took off the other way. He went across the street in an action that would ultimately lead to the death of Ray Liuzza. He went across. Kevin Freeman saw him with that gun, and began to leave. He ran down the street. He told you Ladies and Gentlemen, that he was past Baronne Street and almost to the next block, which was Dryades, I believe, before he heard the first shot. And, that's very important, Ladies and Gentlemen. He told you also, what that man was wearing that night. He said, he was wearing a black leather jacket and blue jeans. Did you hear that description from any other witness? You most certainly did. You heard

* * *

[p.353]

seen before, And, you know what makes this so important, Ladies and Gentlemen? You know what makes this so totally credible that it can't leave your minds? Remember all the evidence you heard about photographic lineups? When they sign the back of the photograph, they also put the date down that they viewed the photographs. Kenneth Carr -- what's that date?

January 6th, 1985. That man wasn't arrested until January 17th, 1985. So, this man picked out the man he overheard before any newspaper, any television, or anybody else that broadcasted that he's the one that did it. Is that not credible evidence, Ladies and Gentlemen. He picked the man out before he was arrested, before he knew who he was. Something for your very serious consideration to consider with all the other items of evidence, which you've heard, Ken Carr, a man disinterested. A man, who came and testified. A man, who picked his picture out before it was ever plastered all over the newspapers or on the television.

Let's talk about the reward money. You've heard that talked about, mostly out of the lawyers' mouths. Ladies and Gentlemen, not one single person came and took that stand, and told you

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anything about any reward money. There is not one word that is in evidence in this case from people, who took this stand regarding reward money. If there had of been, you'd have heard them put somebody on, and say, "so, this person has made a claim on the money . . .

BY MR. FANNING:

Objection, Your Honor. He's going beyond the evidence now, speculating as to what we should have done, or may have done had something happened.

BY THE COURT:

Objection sustained.

BY MR. FANNING:

Thank you.

BY MR. WILLIAMS:

So, if you go in the back, Ladies and Gentlemen, and you talk about, well, this guy wants to get the money, and this guy wants to get the money, I will submit to you, that you will do something that you promised us you wouldn't do during voir dire, that you will go outside the scope of the evidence that was presented at trial. All this reward money is just hearsay. There has been no direct evidence. So, when the witnesses came and said, that I don't know anything about any

[p.355]

reward money. I'm not getting any money, they were telling you the truth because there is no evidence to show otherwise. So, you can put that outside your scope of consideration of this case. No reward money involved. Not at this point anyway, and not as far as those witnesses were concerned.

Now, Ladies and Gentlemen, I'd like to talk just very briefly about the defense's case. They put on two witnesses. The first witness, Mr. Ferguson, came and told you, that he was at a New Year's Eve party at his mother's house,

Mrs. Williams -- Dorothy Williams with her husband, Nathaniel, Nathaniel, Jr., Denise Williams, and several other people. And, he said who was there, and he said, that John Thompson was with him. All right. We asked him, are you telling the truth because one of the first questions that his own attorney asked him was, have you ever been convicted of a crime. He said, no. We asked him, "Sir, is everything you said the truth?" He said, "Yes, it is." And, we asked him, "Have you ever been convicted of gambling?" And then, he fessed up to it. I'm not saying that John Ferguson, or whatever his first name was, came here, and lied -- intentionally lied. I'm saying, that he came here, and he

* * *

[p.438]

A No.

Q That's all I have. Thank you.

BY MR. FANNING:

That's all the defense has to present, Your Honor.

We rest.

BY THE COURT:

Any rebuttal?

BY MR. WILLIAMS:

No rebuttal.

BY MR. DUBELIER:

No, Your Honor. We're ready to argue.

BY THE COURT:

Very well.

* * * * * * * * * * *

BY MR. WILLIAMS:

Ladies and Gentlemen, I would ask for your attention for a few more moments. I come before you right now with the most difficult task, and I think you know exactly what that is. You twelve people, in a few minutes, are going to have to go back and deliberate, and you're going to make a decision. You're going to make a decision whether or not you're going to spare his life, and recommend that he get life imprisonment, or you're going to recommend that he be given the death penalty. I'm sure that not one single one of you take that lightly. I don't like to be up here where I

[p.439]

am right now. I'm sure that those gentlemen, the two attorneys for the defense, are not in a position they want to be in. When Mr. Dubelier gets up in a few minutes to give a rebuttal, he is

not going to want to be where he is today. None of us, none of the twelve of you want to be where you are today. I think I can say that for all of you. But, there's one thing that's brought us here today, and that is John Thompson, and what he did on December 6th. So, in a few minutes, if a guilt trip is laid on you about the fact that you will have to live with the decision you make, I want you to keep in mind that the only reason that we're here today is because of what that man did, not for any other reason. So, keep that in mind.

Now, Ladies and Gentleman, the State of Louisiana, as I told you during voir dire, and I'm telling you right now, is asking that you consider recommending a sentence that will consign him to the electric chair. And, I'm going to tell you why. Before I do that, when you hear the law from the judge, and you go back in the chambers again, and you deliberate, I think, Ladies and Gentlemen, if you go back there and you discuss the pros and cons of capital punishment, you'll be going outside what you

[p.440]

should be doing. Because as each and every one of you told the state, you could all consider capital punishment in certain circumstances, and all twelve of you, Ladies and Gentlemen, said that you believed in capital punishment. So now, and when you deliberate is not going to be the time for you to discuss that, since you've already given your oath as jurors that you believed in it, and that you could consider it.

And also, all of you told the state, that during the course of an armed robbery, if someone was killed, under that set of circumstances, you could also consider capital punishment. And, that's exactly what we had. We had an armed robbery, and during the course of that armed robbery, the victim was murdered. He was shot five times. One of the aggravating circumstances, Ladies and Gentlemen, is that the offense is committed in an especially cruel, heinous, or atrocious manner. As I said several hours ago, when I gave my rebuttal argument, Mr. Ray Liuzza, Jr. didn't have to be killed. The property was taken from him. He was shot in the front, as Dr. Samuels told you, shot in the arm. He didn't have to die, because as we know from his testimony, the shot which killed Ray T. Liuzza, Jr. was fired at his back, and it was

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fired, I would submit to you the evidence shows, as he tried to run, since that shot went through him, and went directly into that house. And, there were two other shots to the back. And, as a result of those shots, Ray Liuzza was mortally wounded. He lie on the ground. You heard testimony from Miss Staab and from Mr. Schliffka, that he said, "Oh, God, I'm dead, get an ambulance. I'm dying." He lay like that several minutes, knowing that he was going to die. He didn't die until 2:17 in the morning, a couple of hours later.

I would submit to you, that that man went through pain and suffering, that probably nobody in this

audience could ever imagine. He lie there knowing that he was going to die for a ring, a wallet, and some credit cards because of that man right there.

I would submit to you, that the state has proven beyond a reasonable doubt that this offense, shooting three times in the back, was committed in a cruel manner, an atrocious manner, and a heinous manner.

Additionally, Ladies and Gentlemen, the state has already proven by virtue of your verdict, that at least one other aggravated circumstance existed, and that is the fact, that this was a murder, and it was a murder committed

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during an armed robbery. This wasn't a domestic squabble. This wasn't a confrontation without cause. This was John Thompson taking this gun, loading this gun from wherever he got it from, putting it on his possession, and going out, and actively seeking to rob someone. John Thompson made a decision, Ladies and Gentlemen, when he took that gun from wherever he came from, and loaded it. He made the decision, that he was going to rob someone, and by virtue of the fact that that gun was loaded, he had made the decision that if something happens, he was going to kill the person, or try to kill him if they resisted, or for whatever reason that they were going to be a witness against him. He, John Thompson, made

that decision. I want you to think about that. Nobody else put him here but his actions.

Now, Ladies and Gentlemen, if you by your recommendations say life imprisonment, let me tell you a little bit about what that is. If you recommend that he be given for the balance of his natural life in prison, that means that he will go to one of the facilities in the Department of Corrections, more than likely, Angola, Louisiana, and he will be there, and he will start a new life. He will make new friends. He will be able to have visits from

[p.443]

his family. He will be able to play softball. He'll lead a new life. There are recreations there. He is being punished, but it is . . .

BY MR. FANNING:

Excuse me, Your Honor. I object, and I think there's a line of case law, a body of case law as to the prosecutor commenting on what would happen after the life sentence is imposed if such a recommendation is made. I find this objectionable, and ask the court to instruct the prosecutor to refrain.

BY THE COURT:

Objection is overruled.

BY MR. WILLIAMS:

He'll begin a new life.

Ten years from now, Ladies and Gentlemen, ten years from now, that man will be up in North Louisiana. It will be a lot different than it is now. But, I can tell you one thing for sure, and then, I'm going to sit down. But ten years from now, that family over there, they're going to go, and they're going to have a loved one, who's dead and buried, and he's going to be buried ten years from now, and nothing is ever going to change that. And all of that, is because that man wanted money, wanted whatever he could get, and made a snap decision, that he was going to kill somebody. It's

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because of him, and no matter what they say when they get up, the reason that we're all here today is what he did, and I'll submit to you, that based on what he did, he should be sentenced to death, and the State of Louisiana asks, that upon careful consideration of the aggravating circumstances that have been proven in this case, that when you return, you'll recommend the death penalty for John Thompson.

* * * *

BY MR. FANNING:

Mr. Williams indicated to you that I was going to get up, and try to lay a guilt trip on you if you

choose to recommend to the court that the death penalty be imposed in this case. Well I'm going to tell you now, that I have no such intention. This is your decision to make.

I'd like to point out a few things to you, and ask you to consider it, but you're here performing a function probably more difficult than Mr. Couhig and I's role here today.

We're court appointed counsel, and we came in, and whatever somebody might say in the future about the case we tried, we tried.

There are certain arguments that defense attorneys make and raise in closing arguments in capital

* * *

[p.451]

Consider the testimony of Mary Lagarde. It's important because, if anything goes to the character of that man, it's the testimony of Mary Lagarde.

BY MR. FANNING:

You Honor, I think now we're clearly beyond the scope of my argument.

BY THE COURT:

Objection overruled.

BY MR. DUBELIER:

Based on her testimony, but for a split second, would there be three more murder victims? Would this be his second murder trial? I think so, because Mr. Thompson has a little signature that he uses -- 357 magnum. That's his signature. This one almost killed three kids. This one killed one man. That's how he signs when he leaves somewhere. That's John Thompson. Now, I'll tell you, Folks,

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you're going to consider the circumstances and his personality, this is his personality. You don't have to hear from any highfalutin sociologist to figure out all about John Thompson. Look at these. Look as these. He likes them. And, he kills with them. Think about these when you go back to determine what you want to do with him. What does he consider the value of life? I think that's important when you go back to consider what the penalty should be. How does he value life? And, there is one important piece of evidence that came in during this trial, that I think puts a pretty good value, and a pretty good indication on how he values life. And, it's a gold pinky ring with an initial on it, that he took from a man, that he'd shot and killed. Now, what did he do with the ring? He sold it for six bucks. Well, I think that tells us how much he valued Ray Liuzza, Jr.'s life -- six bucks. That's it. Make him pay for that. Make him pay now because he hasn't paid up to now. Now, it's your

turn to make him pay. He's not a child. He's twenty-two years old, and he's a grown man.

There are some cases of first degree murder where life imprisonment is the appropriate penalty. A man, who's never been in trouble before. A

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fifteen or sixteen year old, who goes out and commits an armed robbery, and in a panic, a gun discharges and kills someone. That doesn't exist here. This is a twenty-two year old man, who went out with a pistol, walked the streets of this City, found a victim, robbed him, shot him five times, and killed him. That doesn't have life imprisonment written on it. Not at all. It's got death penalty written on it because you need to send a message to him, that you're not going to tolerate what he's done.

You know, Folks, the evidence is in pertaining to his prior convictions of attempted armed robbery, and the sentence is in the record. He is currently serving a sentence for forty-nine and a half years without the benefit of parole, without benefit of probation, without benefit of suspension of sentence. What does that mean to someone who is twenty-two years old? That's life. That's life. He can't get out. And now, he stands trial for murder. And, what are you going to do? You're going to say, "Okay, we'll give you one more life. We'll put another life sentence on top of the one you already have." Do you know what that means? That means he wins. He

wins. He walks out of this courtroom, and he laughs, and

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he says, "Ha, ha, they put me through all that. They put me through three days of trial. They found me guilty of killing that man. I killed the man, and they didn't do anything to me. I already had the forty-nine and a half years. I'm going to jail for the rest of my life. Ha, the joke is on them. They didn't do anything to me. They can't hurt me even though I killed that man." That's a dangerous message to send, Folks, to anyone, especially someone like that, to let him get away with something like this. He took a life in the most horrible manner that one can possibly take a life -- a violent, violent murder. He did it. He premeditated it. He went out there that night with that gun. He walked the streets, and unfortunately for Ray Liuzza, they crossed paths. And, did Ray Liuzza have a chance? No. I submit to you he didn't because you don't have a whole heck of a lot of a chance when you look into one of these. And, think about the testimony, and think about what that man said, when he saw Ray Liuzza get out of that car. What did he tell Kevin Freeman? He upped with the gun, and said, "I'm gonna hit him." Before he ever stepped out on that street, he knew what he was going to do. And as Mr. Williams stated, the shame

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO: 03-2045
SECTION : "J" (5)

[Filed February 9, 2007]

JOHN THOMPSON	)
	)
VERSUS	)
	)
HARRY F. CONNICK, ET AL.	)
	)

JURY INSTRUCTIONS

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

It is your duty to follow the law as I give it to you. On the other hand, you the jury are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

You have heard the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence and are not instructions on the law.

They are intended only to assist the jury in understanding the evidence and the parties'

* * *

THE CLAIMS

This is a civil action in which Plaintiff John Thompson alleges that Defendant District Attorney's Office, acting under color of state law, prosecuted him for crimes while withholding evidence that was favorable to him. Mr. Thompson alleges that the District Attorney withheld favorable information pursuant to a policy that failed to meet the minimum constitutional requirements necessary to protect the rights of citizens like himself. Mr. Thompson also alleges that the District Attorney's Office withheld this information because he inadequately trained his prosecutors on what the constitution requires. Mr. Thompson alleges that as a proximate cause of the unconstitutional policy or inadequate training he was incarcerated for 18 years and nearly executed. The District Attorney's Office denies these allegations and maintains that it had a policy in place that prosecutors must comply with the requirements of the constitution and that prosecutors were adequately trained as to what those requirements were.

GUILT NOT AT ISSUE

Although you heard evidence about the 1985 trials, you are not being asked to decide whether or not John Thompson is guilty of the crimes with which he was charged. It is undisputed that the armed robbery conviction was set aside based on the scientific blood evidence and that a jury ultimately found Mr.

Thompson not guilty of the Liuzza murder. Those issues already have been decided.

OFFICIAL CAPACITY

Mr. Thompson has asserted claims not only against the Orleans Parish District Attorney's Office, but also against Harry Connick, Eric Dubelier, James Williams, and Eddie Jordan in their so-called "official capacities." A lawsuit against a governmental officer in his "official capacity" is the same as a suit against the entity of which the officer is an agent. Thus, the claims against Harry Connick, Eric Dubelier, James Williams, and Eddie Jordan are, in effect, claims against the Orleans Parish District Attorney's Office as an entity.

Harry Connick, Eric Dubelier, and James Williams are named as defendants because they were government officials at the time of John Thompson's prosecution and their conduct is alleged to have created liability for the District Attorney's Office. Eddie Jordan is named because he is the successor district attorney. There need not be any finding of personal conduct by Eddie Jordan to impose liability on him and the District Attorney's Office.

In their official capacities, the named individual defendants cannot be held personally liable. Any judgment in this case will be recovered from the Orleans Parish District Attorney's Office and not from the individual defendants personally.

SECTION 1983 - ELEMENTS OF CLAIM

Section 1983 of title 42 of the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law. . .

Mr. Thompson must prove the following elements by a preponderance of the evidence:

> First: The defendants were acting under the color of state law.
>
> Second: While acting under color of state law, the defendants deprived the plaintiff of a federal right.
>
> Third: The deprivation of the federal right was caused by an official policy, practice, or custom.
>
> Fourth: The violation of the plaintiff's federal right caused the plaintiff damages or injury.

ACTION UNDER COLOR OF STATE LAW

Because the defendants in this case were acting in their official capacities as prosecutors for the Parish of Orleans at the relevant time, I instruct you that they were acting under color of state law. In other words, this element of Mr. Thompson's claim is not in dispute,

and you must find that this element has been established.

DEPRIVATION OF A FEDERAL RIGHT

The second element of Mr. Thompson's claim is that the District Attorney's Office deprived him of a federal constitutional right.

In this case, the constitutional right involved is an accused's right to have the prosecutor provide to the accused all evidence known to the state that is favorable to the accused in advance of trial. A prosecutor's failure to produce evidence favorable to an accused violates the constitution where the evidence is material to guilt, to punishment, or to the credibility of a witness, such that the suppression of the evidence undermines confidence in the result of the criminal trial. The good or bad faith of the prosecution does not matter. The prosecutor's obligation to disclose information is based on what all state officers knew at the time, not just on the information that the prosecutor has in his or her possession. Implied within this obligation is a duty of the individual prosecutor to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.

The prosecutor's duty to produce evidence favorable to the accused is sometimes referred to as the Brady doctrine, named after a decision of the United States Supreme Court called Brady v. Maryland. The Brady doctrine is based on an evolving series of court decisions and is integral to the justice and fairness of our criminal system.

In this case, I have determined that the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case violated his constitutional rights as a matter of law. With regard to the non-production of the blood evidence, therefore, the only issue that you need to decide concerns whether a policy, practice, or custom of the District Attorney's Office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence.

OFFICIAL POLICY, PRACTICE OR CUSTOM

The third element of a section 1983 claim is that the deprivation of the constitutional or federal right must have been caused by an official policy, practice or custom.

A governmental entity, such as the Orleans Parish District Attorney's Office, cannot be held liable solely because one of its employees violated Mr. Thompson's constitutional rights. An entity may be held liable under section 1983 for the constitutional violations of its employees only when an official policy, practice, or custom of the entity was a substantial cause of the deprivation of the plaintiff's rights.

In this case, there are two ways that Mr. Thompson can satisfy the official policy, practice, or custom requirement:

First: Where a person charged with the responsibility of making policy for the District Attorney's Office promulgates a generally applicable policy, practice or custom, and the act

complained of is simply an implementation of that policy, practice or custom;

Second: Where an official policymaker has failed to act when the need is so obvious and the failure to act so likely to result in the very violation that occurred in this case that the failure to act rises to deliberate indifference.

OFFICIAL POLICY

As noted, the District Attorney's Office may be held liable if the deprivation of Mr. Thompson's constitutional rights was caused by actions that implement or execute an official policy.

An official policy, for purposes of section 1983 liability, may be a policy statement, ordinance, regulation, or decision that is expressly adopted and promulgated by an official who has final policy-making authority. I have found as a matter of law that in this case only Harry Connick had final policy-making authority over the issue of producing Brady material.

In order to satisfy the official policy requirement there need not be a formal statement of policy. A persistent, widespread practice of the District Attorney or his prosecutors, which, although not authorized by expressly adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents official policy may also qualify. In evaluating this issue, you are not limited to the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case. You may consider all of the evidence presented at this trial.

LIABILITY THROUGH INADEQUATE TRAINING OR SUPERVISION

The District Attorney's Office may also be liable under section 1983 when the District Attorney fails, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from the constitutional violations that occurred in this case. Even a facially valid policy will support liability if it was issued with deliberate indifference to the known or obvious consequences that constitutional violations would result from it.

In order to hold the District Attorney's Office liable for the violation of Mr. Thompson's constitutional rights, you must find that Mr. Thompson has proved each of the following things by a preponderance of the evidence:

First: The District Attorney's training program was inadequate to train his prosecutors to carry out their duties, or the District Attorney failed to adequately monitor or supervise his prosecutors in carrying out their duties.

Second: The District Attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference to the fact that inaction would obviously result in a constitutional violation.

Third: The District Attorney's failure to adequately train, monitor, or supervise proximately caused the violation of Mr. Thompson's constitutional rights in this case.

Deliberate indifference requires a showing of more than negligence or even gross negligence. For liability to attach because of a failure to train, the fault must be in the training program itself, not in a particular prosecutor. In order to find that the District Attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference, you must find that Mr. Thompson has proved each of the following three things by a preponderance of the evidence:

First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the constitution to be provided to an accused.

Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed.

Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights.

In evaluating this issue, you are not limited to the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case. You may consider all of the evidence presented at this trial.

CAUSATION

In order to succeed in this matter, the plaintiff must prove that defendant's official policy was a cause of the damage plaintiff suffered. By "cause of the

damage" I mean that the negligence or fault was both a cause-in-fact and a proximate cause of the damage.

An act or a failure to act is a **cause-in-fact** of an injury or damages if it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damages.

An act or omission is a **proximate cause** of the plaintiff's injuries or damages if it appears from the evidence that the injuries or damages were a reasonably foreseeable consequence of the act or omission.

As to the requirement that the plaintiff's damages be caused by the defendant's conduct, I do not mean that the law recognizes only one cause of any damage, consisting of only one factor or thing, or the conduct of only one person or entity. On the contrary, many factors or things may operate at the same time, either independently or together, to cause injury or damage. You should resolve this question by deciding whether the plaintiff would probably not have suffered the claimed damages in the absence of the wrongful acts by the defendants. Stated another way, Mr. Thompson must prove that the wrongful acts of the defendants were the moving force behind his injuries. Mr. Thompson must prove that, more likely than not, the Brady material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised, or monitored regarding the production of Brady evidence.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO: 03-2045
SECTION : "J" (5)

[Filed February 9, 2007]

JOHN THOMPSON	)
	)
VERSUS	)
	)
HARRY F. CONNICK, ET AL.	)
	)

SPECIAL VERDICT FORM

1. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by an official policy of the District Attorney?

Yes _____ No ✓

PROCEED TO QUESTION 2.

2. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?

[unreadable initials 2/9/07]

Yes ✓ No ✓

IF YOU ANSWERED YES TO QUESTION 1, OR TO QUESTION 2, OR TO BOTH, PROCEED TO QUESTION 3; IF YOU ANSWERED NO TO BOTH QUESTION 1 AND QUESTION 2, SIGN AND DATE THE FORM AND RETURN TO THE COURTROOM.

3. Please state what sum of money, if any, would reasonably and fairly compensate John Thompson for damages he has actually suffered or is reasonably likely to suffer in the future as a result of the District Attorney's policy or deliberate indifference.

$14,000,000

PLEASE SIGN AND DATE THE FORM AND NOTIFY THE COURT SECURITY OFFICER THAT YOU HAVE REACHED A VERDICT.

New Orleans, Louisiana, signed this 9th day of February, 2007.

/s/ Wendy M. Dennis
FOREPERSON

* * *

[*See original Special Verdict Form, next 2 fold-out pages*]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN THOMPSON	•	CIVIL ACTION
VERSUS	•	NO: 03-2045
HARRY CONNICK, ET AL.	•	SECTION: "J"(5)

SPECIAL VERDICT FORM

1. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by an official policy of the District Attorney?

Yes_____ No ✓

PROCEED TO QUESTION 2.

2. Was the Brady violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?

Yes ✓ No 2/9/07

IF YOU ANSWERED YES TO QUESTION 1, OR TO QUESTION 2, OR TO BOTH, PROCEED TO QUESTION 3; IF YOU ANSWERED NO TO BOTH QUESTION 1 AND QUESTION 2, SIGN AND DATE THE FORM AND RETURN TO THE COURTROOM.

3. Please state what sum of money, if any, would reasonably and fairly compensate John Thompson for damages he has actually suffered or is reasonably likely to suffer in the future as a result of the District Attorney's policy or deliberate indifference.

$14,000,000

PLEASE SIGN AND DATE THE FORM AND NOTIFY THE COURT SECURITY OFFICER THAT YOU HAVE REACHED A VERDICT.

New Orleans, Louisiana, signed this 9th day of February, 2007.

Wendy M Dennis
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
CASE NUMBER: 03-2045
SECTION: J

JOHN THOMPSON	)
	)
VERSUS	)
	)
HARRY CONNICK, ET AL	)
	)

QUESTIONS OF THE JURY DURING DELIBERATION

2/9/07 W.Dennis
1:47 pm

QUESTION 1: What does "Deliberate" Indifference mean? Does it mean intentional or would "Failure to Monitor" be considered Deliberate?

ANSWER FROM THE COURT: "Deliberate Indifference" does not necessarily mean intentional, but does require more than mere negligence or even gross negligence. Please refer to pages 26 & 27 of the legal instructions for further guidance.

/s/ Carl J. Barbier
2:10 p.m.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER: 03-2045
SECTION: J (5)

[Filed February 12, 2007]

JOHN THOMPSON	)
	)
VERSUS	)
	)
HARRY CONNICK, ET AL	)
	)

JUDGMENT

This case came on for trial by jury on February 5, 2007 through February 9, 2007, before District Judge Carl J. Barbier.

Considering the answers of the jury to the interrogatories propounded by the Court at the trial of this matter; and further considering the direction of the Court as to entry of judgment, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, JOHN THOMPSON, and against defendants, HARRY F. CONNICK, ERIC DUBELIER, JAMES WILLIAMS, and EDDIE JORDAN in their official capacities, and the ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE, jointly and in solido in the amount of $14,000,000.00, with legal interest from date of entry of judgment, and reasonable attorneys' fees and costs.

Dated at New Orleans, Louisiana, this 12th day of FEBRUARY, 2007.

/s/ Carl J. Barbier
UNITED STATES DISTRICT JUDGE

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 2002-K-0361

[Filed July 17, 2002]

STATE OF LOUISIANA	)
	)
VERSUS	)
	)
JOHN THOMPSON	)
	)

* * * * * *

ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 305-826, SECTION "B"
HONORABLE PATRICK G. QUINLAN, JUDGE

* * * * * *

JUDGE MICHAEL E. KIRBY

* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

HARRY F. CONNICK, DISTRICT ATTORNEY
VAL M. SOLINO, ASSISTANT DISTRICT ATTORNEY
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NEW ORLEANS, L.A. 70119
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AND
ROBERT GLASS
530 NATCHEZ STREET
NEW ORLEANS, LA 70130
COUNSEL FOR RELATOR

WRIT APPLICATION GRANTED; JUDGMENT DENYING APPLICATION FOR POST CONVICTION RELIEF REVERSED; RELATOR'S CONVICTION AND SENTENCE REVERSED AND THE CASE IS REMANDED.

[initials: MEK
MGW
PRM]

STATEMENT OF THE CASE

In January, 1985, the relator was indicted for the first degree murder of Ray Liuzza. On May 8, 1985, a jury found him guilty as charged and subsequently recommended the death penalty, which the trial court imposed on June 25, 1985. The Supreme Court affirmed his conviction and sentence. State v. Thompson, 516 So. 2d 349 (La. 1987). The U.S. Supreme Court denied certiorari. Thompson v. Louisiana, 488 U.S. 871, 109 S.Ct. 180 (1988).

In 1989, the relator filed an application for post conviction relief in the trial court and supplemented his application in 1991. The trial court subsequently denied relief, and the relator sought review in the Supreme Court, filing additional claims. On September

23, 1994, the Supreme Court remanded the case for an evidentiary hearing regarding potential impeachment evidence which the relator alleged was withheld. State ex rel. Thompson v. Whitley, 92-3184 (La. 9/23/94), 642 So. 2d 1303. The trial court heard the matter on June 23, 1995 and denied relief on September 19, 1995. The Supreme Court subsequently denied review of the trial court's ruling. State ex rel. Thompson v. Cain, 95-2463 (La. 4/25/96), 672 So. 2d 906. The relator then filed a writ of habeas corpus with the United States District Court for the Eastern District of Louisiana, and that court denied relief on February 24, 1997. Thompson v. Cain, No. 96-2268, 1997 WL 79295 (E.D. La. 2/24/97). On appeal from that ruling, the Fifth Circuit denied relief, Thompson v. Cain, 161 F.3d 802 (5th Cir. 1998), and the relator alleges the Supreme Court denied review on March 8, 1999.

In April, 1999, an investigator for the relator discovered additional microfilmed records in this case and in an unrelated case. Based upon these records it was discovered that the State had withheld blood identification evidence in an unrelated armed robbery case in which the relator had been convicted of attempted armed robbery just prior to the trial in this case. The evidence conclusively proved that the relator was not the perpetrator of that offense. The State had used the attempted armed robbery conviction as an aggravating circumstance to support the imposition of the death penalty in the present case. On June 29, 1999, the trial court (the same section of court where the murder was tried) granted the relator a new trial in the armed robbery case, and the State immediately nolle prosequied the armed robbery charge.

On December 22, 1999, the relator filed in the trial court an application for post conviction relief in the present case raising five claims: (1) he was denied his right to testify at trial because of the existence of the prior attempted armed robbery conviction, which had been the product of misconduct by the State; (2) he was denied his right to present a defense because he could not testify due to the existence of the attempted armed robbery conviction; (3) the State withheld exculpatory evidence; (4) his due process rights had been violated due to the egregious conduct of the State; and (5) at a minimum, his death sentence should be vacated because it was based upon his attempted armed robbery conviction, which had been set aside. The court heard the matter on October 26, 2000, and on May 26, 2001 the court denied the application as to the first degree murder conviction but vacated the death sentence and imposed a sentence of life imprisonment. The relator noted his intent to seek relief as to the denied claims, timely sought and obtained extensions of the return date, and has filed his writ timely in this court. The State has also responded.

FACTS

The following fact summary was taken from the Supreme Court's opinion in the relator's appeal:

> On the morning of December 6, 1984 at about 12:30, Kevin Freeman was driving home from his sister's house when defendant stopped him and requested a ride. Although running low on gasoline, Freeman agreed to give defendant a ride because they knew each other and lived in the same neighborhood. After driving a few blocks, the automobile began to run out of

gasoline and Freeman parked on the side of the street. Freeman locked the car and began walking home with defendant. Freeman asked defendant if he had any money. Defendant responded by asking if Freeman wanted to make some money and stated, "I got the heat with me." Meanwhile, Raymond T. Liuzza, Jr. was returning home and parked his automobile nearby. Defendant spotted Liuzza and informed Freeman, "I'm going to hit him." When Liuzza exited his automobile, defendant drew his .357 magnum revolver. Freeman watched defendant cross the street, grab Liuzza from behind, and throw him to the ground. As Freeman fled, he heard several shots. He looked back and saw defendant running away. Pamela Staab, a neighbor of Liuzza's, was awakened by his voice outside her bedroom window. She heard Liuzza offering his watch and wallet to his assailant. She then heard several gunshots. Staab heard nothing suggesting that Liuzza struggled or wrestled with his assailant. Paul Schliffka, another neighbor of Liuzza's, was leaving his home to meet some friends when he heard a gunshot. He began walking to the corner and heard four more shots. Schliffka then saw a man with a gun in his right hand running away. He described this man as black, about six feet tall, with short hair, wearing a black leather or plastic jacket and dark pants. This description was corroborated by Freeman who testified that defendant was wearing "a big black heavy jacket with ... jeans." Officer David Carter received a call at about 12:30 that morning, dispatching him to the scene of the crime. When he arrived, the victim was lying down on his left side next

to the sidewalk. Liuzza remained conscious until the ambulance arrived and repeatedly pleaded with Carter to bring him to the hospital. Liuzza told Carter that he had been robbed by a black male and repeatedly asked, "Why did he have to shoot me?" Liuzza died at 2:17 a.m. He was thirty-four years old.

The autopsy revealed that Liuzza had been shot five times, once in the right armpit, once in the right buttock, and three times in the back. All of the bullets passed completely through the victim's body, two of which were recovered from the wall of Staab's apartment. Two of the wounds to the back proved fatal. Because of the absence of discharged powder on the victim's skin or clothing, it was estimated that the muzzle of the gun was at least three to five feet away from the victim when fired. Subsequent investigation revealed that defendant, through Richard Perkins, sold the murder weapon to Junior Lee Harris. Police executed a search warrant for the gun at Harris' home and discovered Liuzza's gold pinky ring on his finger. Defendant had sold the ring to Harris for six dollars. Police also learned that Harris had sold the murder weapon to Jessie Harrison, from whom the police recovered it. The two spent bullets recovered from Staab's apartment were identified as having been fired from the murder weapon. A letter was recovered in which defendant requested the help of an unidentified person called "Big Daddy Red" in concealing his involvement in the crime. Defendant also made incriminating statements to Freeman and Perkins. Finally, Kenneth Carr testified that he

> overheard defendant's conversation with another at Harry's Bar in which he expressed concern over the reward offered for information leading to the arrest of Liuzza's assailant.

State v. Thompson, 516 So. 2d at 350-351.

DISCUSSION:

Initially, it must be noted that this court has jurisdiction over this matter, and the claims raised by the relator are not barred by La. C.Cr.P. art. 930.8. Although this court had not participated in any of the earlier filings due to the imposition of the death sentence, the trial court vacated the death sentence in 2001 and imposed a life sentence. At that point, this court obtained supervisory jurisdiction over the case. With respect to art. 930.8, the defendant was convicted in 1985. However, it was not until 1999 that the relator learned of the withheld evidence which led to the attempted armed robbery, and after that conviction was vacated and the case nolle prosequied, the relator then filed the instant claims in the trial court in 1999. Thus, because the relator raised the majority of the instant claims a few months after learning of the basis for them, they are not barred by art. 930.8.[1]

The trial court vacated the death sentence in 2001 because it found the sentence was based upon the prior attempted armed robbery conviction, which it had

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[1] Art. 930.8A(1) provides that the two-year time limitation for seeking post conviction relief does not apply where: "The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicted where not known to the petitioner or his attorney."

vacated in 1999. It denied the remainder of the relator's claims. The remaining claims may be split in two groups: (1) the relator's right to testify in his own behalf and present his defense was violated; and (2) the State failed to produce police reports "and other information" which would have identified "eye- and ear-witnesses" whose testimony would have exonerated him and inculpated his codefendant, would have provided contradictory evidence to impeach his codefendant's testimony, and would have shown that the other two independent witnesses who stated they heard the relator admit to committing the murder had been promised reward money for their testimony. The relator admits the last portion of the second group has been rejected by both the Louisiana Supreme Court and the federal courts, but he insists that the cumulative effect of this and the other withheld evidence entitles him to a new trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

A ruling in favor of relator on the first group of claims will render the second group moot. The relator argues that he was effectively denied his right to testify in his defense because of the improper acts of the State in the armed robbery case, which led to his illegal attempted armed robbery conviction. He argues that he would have testified in his defense at the murder trial but for the attempted armed robbery conviction, which he knew the State would use to impeach his credibility. He argues that the State knew his blood type did not match the blood type of the perpetrator of the armed robbery, but it withheld this evidence to obtain his conviction in that case, to keep him from testifying during the guilt phase of the murder trial and to use as an aggravating factor to support the death penalty.

There is no doubt that the unrelated attempted armed robbery conviction was improper. The defendant's decision not to testify at the murder trial was based upon the existence of this prior conviction. At the conclusion of the murder trial, defense counsel placed on the record the following statement:

> . . .prior to the defense resting in this case, Mr. Couhig and I consulted with our client, Mr. Thompson, and discussed with him the possibility of him taking the witness stand, and testifying on his own behalf. We advised Mr. Thompson at that time, that should he take the witness stand, that the fact that he has prior convictions, including the prior conviction for attempted armed robbery would come up before the jury, which it would not if he didn't testify. Of course, that is in keeping with our previous motion in limine, requesting that that not be allowed to be used as impeachment evidence. Given the fact that were Mr. Thompson to take the stand, that would have been used against him, and after consulting with us, Mr. Thompson concurred in our decision not to take the witness stand, Your Honor.

The State does not dispute that the relator would have testified in the absence of the attempted armed robbery conviction. Indeed, the attachments to the application show that the defendant testified in his own defense at his armed robbery trial which occurred a little over a month prior to the murder trial. Thus, we conclude the relator would have testified at his murder trial but for the improper attempted armed robbery conviction.

The relator contends that the State's deprivation of his right to testify in his own behalf and to present his defense is a structural error for which a reviewing court cannot apply a harmless error standard.

In State v. Dauzart, 99-3471 (La. 10/30/00), 769 So.2d 1206, the defendant originally indicated he did not want to testify. The defense rested subject to the viewing of certain documents, and while the court was viewing the documents, the defendant changed his mind and announced he wanted to testify. The court refused to allow him to do so. On appeal the circuit court found no error, but on review, the Supreme Court reversed his conviction, agreeing with the dissenting circuit court judge in his finding that under the "totality of the circumstances" of the case it was an "abuse of the trial court's discretion" to refuse to allow the defense to reopen its case for the defendant's testimony.

The court noted that defense counsel had told the jury in his opening statement that the defendant would testify. The court also noted that although the State had announced it had no rebuttal witnesses, it would not have been prejudiced by allowing the defendant to testify because it would still have had the opportunity to call any rebuttal witnesses it needed to counter the defendant's testimony. In addition, the defendant's decision to testify came while the court was still perusing the records, and his testimony would not have unduly disrupted the proceedings. After employing this "abuse of discretion" test, the Court then further stated:

> Because "the most important witness for the defense in many criminal cases is the defendant

> himself," *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987) deemed the accused's right to present his or her testimony at trial "[e]ven more fundamental to a personal defense than the right of self-representation" under the Sixth Amendment. *Rock*, 483 U.S. at 52, 107 S.Ct. at 2709; see also *United States v. Walker*, 772 F.2d 1172, 1179 (5th Cir.1985) ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."). No matter how daunting the task, the accused therefore has the right to face jurors and address them directly without regard to the probabilities of success. As with the right of self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis. The right "is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984).

Dauzart, at pp. 6-7, 769 So. 2d at 1210-1211. In McKaskle, cited by the Court, the U.S. Supreme Court held that a defendant's right to conduct his own defense was not violated by the unsolicited participation of standby counsel.

Since this application has been pending in this court the Louisiana Supreme Court decided State v. Hampton, 00-0522 (La. 3/22/02), ___ So. 2d ___, 2002 WL 449778, wherein the Court found that the violation of the right to testify was a structural error for which a harmless test could not be used. In Hampton, the defendant wanted to testify, but his counsel told him

that he could not do so because he (counsel) controlled the decision as to whether the defendant would testify, and in his opinion it was not in the defendant's best interest to do so. The defendant did not testify, and he subsequently filed a motion for new trial contending his right to testify had been violated. The trial court agreed and ordered a new trial. The State took writs, and The Fourth Circuit reversed, finding that this error was harmless in this case. State v. Hampton, 99-2142 (La. App. 4 Cir. 1/18/00), unpub. On review, the Court reversed this court, reinstating the trial court's grant of a new trial. The Court noted that a defendant's right to testify is encompassed within the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to compulsory process, and the Fourteenth Amendment's due process clause, as well as in La. Const. art. 1, §16. The Court cited Rock and its progeny in the U.S. Circuit Courts, which held that a defendant's right to testify can only be waived by him. The Court then addressed the issue of whether such error is amenable to a harmless error standard. The Court, on rehearing, clarified that it relied on State v. Dauzart, supra, to find that the deprivation of the right to testify is not amendable to harmless error analysis. The Court reiterated its conclusion on original hearing that "whenever a defendant is prevented from testifying after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers prejudice."

Here, the relator was denied his right to testify in his own behalf based upon the improper actions of the State in the other case. Indeed, the relator's case is more egregious in that it was the State's intentional hiding of exculpatory evidence in the armed robbery case that led to his improper conviction in that case

and his subsequent decision not to testify in the instant case because of the improper conviction. Because Hampton baldly stated that the violation of a defendant's right to testify in his own behalf cannot be reviewed under a harmless error standard, this court cannot employ one in this case. Relator's first and second claims have merit, and the trial court erred by denying his application for post conviction relief on the grounds that his rights to testify in his own behalf and present his defense were violated.

Accordingly, based on Hampton, supra, we conclude the trial court erred by denying the relator's application for post conviction relief. Therefore his writ application is granted, and the ruling of the trial court is reversed. Relator's conviction and sentence are reversed, and the case remanded for further proceedings consistent with the views expressed herein.

WRIT APPLICATION GRANTED; JUDGMENT DENYING APPLICATION FOR POST CONVICTION RELIEF REVERSED; RELATOR'S CONVICTION AND SENTENCE REVERSED AND THE CASE IS REMANDED.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUN 7 - 2010
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No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

A municipality may be liable under 42 U.S.C. § 1983 for a failure to train employees that shows deliberate indifference to, and actually injures, the rights of citizens. *City of Canton v. Harris*, 489 U.S. 378, 389-91 (1978). A history of employee wrongdoing is ordinarily necessary to prove failure-to-train liability, but a single incident may suffice in rare cases. The Court has hypothesized only one—a failure to train armed police officers on using deadly force. The question presented in this case is:

Whether failure-to-train liability may be imposed on a district attorney's office for a prosecutor's deliberate violation of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office.

PARTIES TO THE PROCEEDING

All parties to the proceeding are set forth in the case caption. *See* SUP. CT. R. 24.1(b).

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OPINIONS BELOW

The *en banc* decision and opinions of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a-50a, are reported at 578 F.3d 293 (CA5 2009). The panel opinion, Pet. App. 51a-113a, is reported at 553 F.3d 836 (CA5 2008). The unpublished memorandum opinion of the United States District Court for the Eastern District of Louisiana, Pet. App. 114a-144a, is unofficially reported at 2005 WL 3541035.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 10, 2009. Pet. App. 1a. This Court has jurisdiction to review this judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1983, of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1985, prosecutors in the Orleans Parish District Attorney's Office convicted John Thompson of attempted armed robbery. Aided by that conviction, prosecutors then convicted Thompson of capital murder in a separate case. A month before his execution in 1999, evidence came to light that exonerated Thompson for the robbery. With it came a stunning revelation: a prosecutor had deliberately buried the exculpatory evidence. Thompson's execution was stayed, his robbery conviction vacated, and his murder conviction eventually reversed. Pet. App. 10a.

Thompson then sued the district attorney's office and won a $14 million civil rights judgment. The basis of that judgment was not that an official policy had caused the evidence suppression. The jury rejected that theory. Pet. App. 11a. Nor was the basis that an official policymaker had ordered the suppression. The district court found no evidence supporting that theory. Pet. App. 61a. The judgment depended on a subtler premise. The jury found that the suppression occurred because the district attorney, Harry F. Connick, had been "deliberately indifferent" to the need to train prosecutors.

The district court did not require Thompson to prove that any history of *Brady* violations should have warned Connick to adjust office training. Pet. App. 138a-142a. Affirming the judgment, a Fifth Circuit panel held that—whereas "Thompson did not establish a pattern of *Brady* violations by the DA's Office," and indeed "d[id] not argue that there

was evidence of a pattern"—no such pattern was necessary to establish failure-to-train liability. Pet. App. 72a, 76a, 79a-80a.[1]

The end result was that a district attorney's office was found liable for a prosecutor's single *Brady* violation. In failure-to-train cases, however, a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation." *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997). Liability may be based on a single constitutional violation only "in a narrow range of circumstances." *Id.*

Those narrow circumstances should not include a *Brady* violation. By ruling otherwise, the lower courts allowed a jury to find a district attorney's office liable, not for its own wrongdoing, but for wrongdoing by its employee. That imposition of vicarious liability contravenes the Court's precedents, which "have consistently refused to hold municipalities liable under a theory of *respondeat superior*." *Id.*, at 403 (and collecting cases).

A. CONNICK'S INNOVATIONS IN OFFICE STRUCTURE, SUPERVISION, AND TRAINING

Connick was already an experienced criminal defense attorney and prosecutor when he defeated incumbent Jim Garrison in 1974 to become district attorney of Orleans Parish, Louisiana's largest parish. App. 424-26. Connick would hold that

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[1] The *en banc* Fifth Circuit vacated the panel opinion, but ultimately split 8-8 and thus affirmed the district court's judgment. Pet. App. 2a.

position for almost 29 years. App. 145. During his tenure, Connick "completely restructured the office." App. 425. He vastly improved how the office processed its massive caseload, and how it mentored the more than 700 prosecutors who would work there over the years. Legal scholars have singled out Connick's systemic innovations as path-breaking. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 58-84 (2002).

For instance, Connick re-imagined the system by which prosecutors "screen" potential cases, dramatically lowering the office's acceptance rate. This not only enhanced efficiency but also protected the rights of arrestees, who would be far less likely to languish in jail on flimsy charges. The most experienced prosecutors were typically designated for this critical screening function. App. 187, 202-03, 381, 387.

Connick also fundamentally changed how prosecutors were mentored. At the beginning of his tenure, he brought in eight former Assistant United States Attorneys, "specifically ... to help [him] set this office up to train these people." App. 426. Connick redeployed his predecessor's best prosecutors in order to station two lawyers in each court section—a "junior" and a "senior" prosecutor. This functioned as an "excellent teaching tool" for young prosecutors, who were mentored by experienced attorneys as they progressed through various trial divisions and levels of responsibility. App. 377-79, 426-28. Young prosecutors would also be better advised on the technical aspects of

criminal investigations since, by Connick's express order, a police officer was posted as an investigator in each court section. App. 425-27. Connick's office structure, in sum, was designed to allow prosecutors to amass experience of the most intensive and practical kind in a short period. App. 200-03.

Connick created an in-house system of mooting cases to reinforce this structure. App. 428-29. These "pre-trials" functioned as a rigorous training regime for all prosecutors below the supervisory level, and were personally overseen by the chief or deputy chief of trials. App. 193, 461. Pre-trials "covered just about every aspect of trial," from the prosecutor's theory of the case to any anticipated evidentiary problems. App. 387-89, 461-62. Supplementing this system, prosecutors met weekly with the chief of trials to review all pending cases. App. 389-90, 428-29.

Connick also instituted numerous practices to alert prosecutors to developments in criminal law. For example, regular "Saturday morning sessions" were designed to train prosecutors on technical legal issues, everything from law enforcement technology to "specialized training on rape cases." App. 463. Connick also fostered the practice of circulating advance sheets, intended to "constantly get[] [attorneys] to read and to understand what was new in the law." App. 429. Moreover, Connick insisted that supervising attorneys—principally the chief of appeals—prepare and circulate regular inter-office memoranda highlighting legal developments. App. 389-91, 430-31. Those

memoranda were the precursors to the "formal" policy manual Connick had prepared in 1987. App. 391-93, 467-68. At that time, a formal policy manual was itself an innovation in district attorneys' offices. App. 429.

In sum, Connick oversaw a marked evolution—spanning nearly three decades—in the supervision and training of prosecutors in the Orleans Parish District Attorney's Office. Connick sought to create a culture that encouraged prosecutors to understand and obey their legal obligations. He even inspired an intensive study published in a widely-cited *Stanford Law Review* article. The authors concluded that Connick's "principled screening practices ... make [his] one of the most interesting prosecutor's offices in the country," meriting "widespread attention from other prosecutors and scholars." Wright & Miller, *supra*, at 60. Such farsighted policies created what Connick's chief of trials from 1984 to 1986, Bridget Bane, called a "system of tremendous checks and balances." App. 460-61. Timothy McElroy—a senior prosecutor in 1985 who would become chief of screening in 1990 and eventually first assistant—summarized Connick's approach this way: "Harry was very energetic, very innovative and training was an important part of what he did. In fact, training was a very substantial part of Harry's office." App. 396.

B. CONNICK'S POLICIES ON EVIDENCE DISCLOSURE

Connick's disclosure policies were no mystery: turn over what was required by state and federal

law, but no more. App. 38-45, 90-91, 169-70, 199-200, 439-41. Connick did not lightly reject an "open-file" policy. In New Orleans, revealing too much about an investigation would put cooperating witnesses in mortal danger. App. 433. This wisely cautious approach went hand-in-hand with prosecutors' obligations to make disclosures required by the Sixth Amendment and *Brady*, as well as the Louisiana Code of Criminal Procedure. *See, e.g.*, App. 90-91, 199-200, 338, 440-41, 469.

Awareness of *Brady*'s strictures was ingrained in office culture. McElroy emphasized that "*Brady* in a prosecutor's world is something you study all the time." App. 377. In Connick's office, he explained, "[w]hen you walk in the door ... [y]ou're instructed on *Brady* from the very beginning." App. 393. This was quite literally true. Bane recounted that any attorney interviewing for a position had to write essays on two topics that never varied: one on the exclusionary rule "and another ... on *Brady* material." App. 465-66. Unsurprisingly, then, multiple witnesses testified without contradiction that the office's policy was to disclose all *Brady* materials, always and without exception. App. 158-60, 194, 198, 199-200, 338, 433-34, 438-41, 469. Moreover, regardless of whether they fell within *Brady*, office policy was to turn over *all* scientific reports, such as the lab report in this case. App. 199-200, 209, 282-84, 438, 486.

Prosecutors' compliance with *Brady* was not simply left up to chance, but was reinforced at multiple levels by Connick's office structure. App.

382-93, 464-65. Naturally, the decision to disclose particular evidence lay ultimately with the senior attorney in any case. But *Brady* questions would pass initially through an experienced screening attorney—who would flag potential *Brady* issues on a "Screening Action Form"—and proceed to review by an investigator, the junior attorney, and the senior attorney. App. 382-85, 464-65. The "pre-trial" exercises to which most cases were subjected reinforced this multi-level review of *Brady* issues. App. 387-89, 464-65.

Brady was also addressed outside the ambit of trying particular cases. Weekly "trial meetings," for instance, would scrutinize every facet of pending cases, including *Brady* matters. App. 389-90. Nor were prosecutors left to shift for themselves in keeping abreast of legal developments. In addition to his practice of circulating advance sheets, Connick instructed his chief of appeals to prepare regular intra-office memoranda highlighting the evolution of prosecutors' legal and ethical obligations. App. 429-31, 448-50. That system of ongoing legal education extended to developments in *Brady*. App. 389-91.

In these ways, Connick's office structure reinforced prosecutors' professional obligations to comply with *Brady*. In the 1990s, Connick would add more formalized instruction to his office, such as in-house CLE programs. App. 391. But such "formal" *Brady* training—in the sense of classroom lectures on *Brady* and its progeny—was never the cornerstone of the office's system. *See, e.g.*, App.

171, 247. Connick took a different tack, crafting what he and his office supervisors believed was a far more practical and effective means of enabling prosecutors to honor their duties under *Brady*. Transcript Vol. IV, pp. 785-86. Undermining *Brady* was, as Bane put it, "the farthest thing from my knowledge and understanding of Harry Connick that I could conceive of." App. 469.

C. THE SUPPRESSION OF BLOOD EVIDENCE IN THOMPSON'S ROBBERY CASE

Connick had been in office for a decade when the events surrounding Thompson's *Brady* violation occurred in late 1984 and 1985. At that time, Connick estimated that there were roughly 70 to 75 assistant district attorneys working in the office, and that the office was screening about 15,000 cases a year and accepting roughly half for prosecution. Transcript Vol. IV, pp. 831, 840-41.

1. The *Brady* violation

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. About three weeks later, siblings Jay, Marie, and Michael LaGarde were the victims of an attempted armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the struggle, some of the robber's blood stained the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the robber's blood on it. Pet. App. 53a.

In January 1985, Thompson and Kevin Freeman were arrested for the Liuzza murder. The

LaGardes saw Thompson's picture in the newspaper and believed he was the man who had attempted to rob them. They contacted the district attorney's office and identified Thompson. Pet. App. 53a-54a.

In February 1985, the armed robbery case was screened by assistant district attorney Bruce Whittaker, who received the police report, approved the case for prosecution, and filled out a Screening Action Form indicating that armed robbery charges should be brought. After noting that a technician had taken a bloody swatch of Jay LaGarde's pants, Whittaker wrote on the form that the state "[m]ay wish to do blood test." App. 647. He also recommended that the case be handled by Eric Dubelier as a special prosecutor because it involved the same defendant (Thompson) as the Liuzza murder case, which Dubelier was already handling. App. 46-54.

In March 1985, assistant district attorney James Williams handled a suppression hearing in Thompson's robbery case. Noting the reference to a blood test on the screening form, Williams stated in open court—and in the presence of Thompson's defense attorney—that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion—have a criminalist here on the 27th." App. 47, 51, 82-83, 92-93. About one week before the armed robbery trial, the bloody pants swatch was sent for testing. The record does not reveal who ordered the test. Pet. App. 55a, 35a; App. 65.

Two days before trial, Whittaker received a crime lab report, addressed to his attention, that showed the armed robber's blood was type B. App. 68-69, 178, 655. The report was never turned over to Thompson's attorneys. Pet. App. 55a. Whittaker claimed he placed the report on Williams' desk. App. 179. Williams, however, denied discussing the report with Whittaker or even seeing it until the report surfaced in 1999. App. 68-70. Dubelier also could not remember ever seeing it. App. 284. But he explained what he would have done with such a report:

> ... I prosecuted thousands of case[s] ... and turned over thousands of these type[s] of report. If I had the report, I would have turned it over. [...] [W]e were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office.

Id.

On April 11 and 12, 1985, Thompson was tried for armed robbery by Williams and assistant district attorney Gerry Deegan. App. 31, 77-78. Some time before trial, Dubelier had asked Williams to act as lead prosecutor. The Fifth Circuit panel described what happened as the trial began:

> On the first day of trial, Deegan checked all of the evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the

> evidence into the court property room, but never checked in the pants swatch.

Pet. App. 56a; App. 55, 238-39. The prosecutors relied only on the three eyewitness identifications by the LaGardes. App. 71-72. During the trial, Deegan questioned the crime-scene technician, but did not ask him about the bloody pants swatch. App. 78-80. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison. Pet. App. 56a.

From May 6 to 8, 1985, Dubelier and Williams tried Thompson for the first-degree murder of Liuzza and sought the death penalty. At trial, Freeman testified that Thompson shot Liuzza. An acquaintance of Thompson testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. Pet. App. 56a-57a. Realizing the prosecution would use his robbery conviction to impeach him, Thompson elected not to testify on his own behalf. The jury convicted Thompson of first-degree murder. During sentencing, Dubelier argued that Thompson's prior robbery conviction supported giving him the death penalty. The jury sentenced Thompson to death. Pet. App. 57a.

In the ensuing fourteen years, Thompson exhausted his appeals and his execution was set for May 20, 1999. Then, in late April 1999, an investigator in Thompson's habeas proceedings received, through a public records request, a microfiche copy of the lab report containing the blood type of the robbery perpetrator. Thompson

was tested and found to be type O, definitively ruling him out as the LaGardes' attacker. Thompson's attorneys presented this information to Connick, who immediately moved to stay Thompson's execution. Pet. App. 57a-58a; Transcript Vol. IV, p. 769.

The ensuing investigation revealed what had happened. In April 1994, nearly a decade after Thompson's convictions, Deegan had confessed privately to a fellow prosecutor, Michael Riehlmann, that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson." App. 367; Pet. App. 58a. Deegan, who was suffering from terminal cancer, divulged this shortly after learning he had only months to live. Deegan died about three months later. Riehlmann kept silent until the evidence was discovered five years later, in 1999. At Connick's instigation, Riehlmann was sanctioned by the Louisiana Supreme Court for failing to report Deegan's misconduct. *See In Re Riehlmann*, 2004-0680 (La. 1/19/05); 891 So.2d 1239; App. 362-67.

In 2002, the Louisiana Fourth Circuit Court of Appeal vacated Thompson's murder conviction, holding that the tainted robbery conviction had unconstitutionally deprived him of his right to testify in his own defense at his murder trial. *See State v. Thompson*, 2002-0361, pp. 8-9 (La. App. 4 Cir. 7/17/02); 825 So.2d 552, 557-58; App. 19. Thompson was retried for Liuzza's murder in 2003 although the main witness against him in 1985, Kevin Freeman, was now dead. Thompson was found not guilty. Pet. App. 59a-60a.

2. Thompson's civil rights suit

After his release, Thompson brought suit under § 1983 in the United States District Court for the Eastern District of Louisiana, alleging that the district attorney's office[2] violated his rights by failing to train prosecutors on their *Brady* obligations. *See generally Monell v. Dep't of Social Services*, 436 U.S. 658 (1978) (recognizing municipal liability under § 1983); *Canton*, 489 U.S., at 389-91 (recognizing municipal liability under limited circumstances for failing to train employees).[3]

In denying summary judgment, the district court rejected petitioners' argument that a pattern of similar violations was necessary to prove the office's "deliberate indifference" to *Brady* training. Pet. App. 138a-139a. After the close of evidence,

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[2] Thompson also sued, in their individual and official capacities, Connick, Williams, and Dubelier, as well as Eddie Jordan, who held the position of Orleans Parish District Attorney in 2003. Pet. App. 60a. His official capacity claims against the prosecutors are identical to his claim against the office itself. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); Pet. App. 132a. In the certiorari petition and this brief, Jordan's name has been substituted with that of the current Orleans Parish District Attorney, Leon Cannizzaro.

[3] Thompson's additional state and federal claims were dismissed at various stages. Pet. App. 60a-61a. For instance, after Thompson rested, the district court dismissed his conspiracy claim under 42 U.S.C. § 1985(3). Pet. App. 61a. At the close of evidence, the district court ruled that Dubelier and Williams were not "policymakers" and thus could not create § 1983 liability on behalf of the office. *Id.* The only claim that proceeded to trial was Thompson's § 1983 claim against the office.

petitioners again raised this issue by proposing a jury instruction that "deliberate indifference to training requires a pattern of similar violations." Transcript Vol. IV, p. 1013. Thompson's counsel told the court: "That's not the law, your Honor." *Id.* The court refused the proposed language, explaining that it had already rejected this argument at the summary judgment stage. *Id.*

The court instructed the jury that the failure to disclose the blood evidence violated *Brady* as a matter of law. App. 825. As to deliberate indifference, the court instructed the jury that Thompson was required to prove the following:

> First, that the district attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused.
>
> Second, that the situation involved a difficult choice or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed.
>
> Third, that the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights.

App. 828.[4] The court further explained that, in assessing those issues, the jury was "not limited to

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[4] The three questions were drawn from the Second Circuit's analysis in *Walker v. City of New York*, 974 F.2d 293, 300 (CA2 1992). *See also infra* Part I.A.2.

the nonproduced blood evidence and the resulting infringement of Mr. Thompson's right to testify," but could "consider all of the evidence presented during this trial." *Id.*

Based on these instructions, the jury was asked two questions about what caused "the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial." App. 562. First, it was asked whether those injuries were "substantially caused by an official policy of the district attorney." *Id.* The jury answered "no." *Id.* Second, it was asked whether those injuries were "substantially caused by the district attorney's failure through deliberate indifference to establish policies and procedures to protect one accused of crime from these constitutional violations." *Id.* The jury answered "yes." *Id.*; Pet. App. 61a-64a. Based on its affirmative answer to the second question, the jury awarded Thompson $14 million. App. 562, Pet. App. 64a-65a.[5] Petitioners subsequently moved for judgment as a matter of law on the basis that Thompson had not proven any pattern of similar *Brady* violations, but the district court denied the motion. Mem. in Supp. of Mot. for J.M.O.L. (Doc 147-1), pp. 3-5; Order and Reasons (Doc 169), pp. 1, 5-6.

On December 19, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. Pet. App. 71a-113a. The panel

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[5] The court later added over $1 million in attorneys' fees. June 18, 2007 Order (Doc 182).

specifically rejected petitioners' argument about the required pattern of similar *Brady* violations. *Id.* at 72a-80a. Noting that "Thompson does not argue that there was evidence of a pattern," *id.* at 72a, the panel agreed with Thompson that a *Brady* violation fell within a narrow single-incident exception to the pattern requirement. *Id.* at 73a-79a. The panel thus held:

> Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent, and the district court did not err in denying Thompson's motion for judgment as a matter of law.

Id. at 80a (citing *Walker v. City of New York*, 974 F.2d 293, 300 (CA2 1992)). "Consequently," the panel explained, "the fact that Thompson did not establish a pattern of *Brady* violations by the DA's Office is not dispositive of his claims." *Id.* at 76a.

On March 11, 2009, the Fifth Circuit granted *en banc* rehearing and vacated the panel decision.[6] By separate order, the court asked counsel to brief several specific issues, including whether a single incident can give rise to failure-to-train liability. Mar. 13, 2009, Ltr. of Advisement; App. 10. On August 10, 2009, the equally divided *en banc* court

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[6] Since the panel decision has been vacated, the judgment erroneously naming Connick, Dubelier, Williams and Jordan still remains. *See* Pet. App. 112a n.27 (explaining these defendants should not have been named because they no longer hold office); *see also, e.g., Castro Romero v. Becken*, 256 F.3d 349, 355 (CA5 2001) (explaining that official-capacity claims are duplicative of claims against government entities).

affirmed, with two separate dissents. Pet. App. 2a, 2a-7a, 9a-44a.[7] Writing for six members of the court, Judge Edith Brown Clement would have held that Thompson's evidence of a single violation, accompanied only by "diffuse evidence of *Brady* misunderstanding among several assistant district attorneys," failed to meet the "heightened standards for culpability and causation" for failure-to-train liability. Pet. App. 13a-14a, 32a, 39a.[8]

This Court granted certiorari on March 22, 2010.

SUMMARY OF THE ARGUMENT

A municipality is liable under § 1983 for injuries attributable to its own actions, but not for those attributable to employee wrongdoing. *Monell*, 436 U.S., at 690-94. In limited circumstances, a failure to train employees may trigger municipal liability. *Canton*, 489 U.S., at 389-91. Because it raises the specter of vicarious liability, however, a failure-to-train claim demands stringent proof of fault and causation: inadequate training must show a municipality's deliberate indifference to, and must

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[7] Judge Prado wrote a concurrence for five judges explaining why the judgment should be affirmed. Pet. App. 45a-50a.

[8] Agreeing with Judge Clement, Chief Judge Edith Jones wrote separately to highlight "the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity." Pet. App. 2a-3a (discussing *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009)).

actually injure, the rights of citizens. *Id.* A history of employee wrongdoing is ordinarily necessary to prove fault and causation, but a single incident may suffice in rare cases. *Bryan County*, 520 U.S., at 409. The Court has hypothesized only one—when a city passes out guns to police offices but forgets to train them on the proper use of deadly force. *Canton*, 489 U.S., at 390 n.10.

This case asks whether that single-incident hypothesis should extend to a district attorney's alleged failure to train prosecutors on *Brady v. Maryland*, 373 U.S. 83 (1963). The lower courts ruled that it should—and allowed the case to go to the jury on that basis—but they were mistaken. Without a history of similar violations, a district attorney's allegedly deficient *Brady* training cannot meet the rigorous fault and causation requirements for failure-to-train liability. *See infra* Part I.A.

Prosecutors are not typical employees. They are trained professionals, equipped by education and ethics to assess their *Brady* obligations. A district attorney reasonably relies on prosecutors obeying the standards of their own profession. Absent powerful indications to the contrary, then, a district attorney cannot be deliberately indifferent for failing to "train" prosecutors. *See infra* Part I.A.1. Nor can a lack of training directly cause a *Brady* violation. In most cases, what actually causes a violation is the prosecutor's own lapse, not a district attorney's failure to train the prosecutor on what he was already equipped to know and do. *See infra* Part I.B.

The lower courts misapplied *Canton* by extending its single-incident scenario to prosecutors' *Brady* compliance. The two situations are worlds apart. In *Canton*, untrained police officers were asked to intuit deadly force standards. A municipal employer who places its officers in that dilemma is, by definition, callously indifferent to the rights of citizens those officers will apprehend. But a district attorney who relies on prosecutors' professional ability to assess *Brady* material is not in remotely the same position. The lower courts simply missed the obvious: training police to arrest criminals is nothing like training lawyers to interpret the law. *See infra* Parts I.A.2 & I.B.

Based on this flawed analysis, the jury was allowed to impose liability on Connick's office for a single *Brady* violation unaccompanied by any pattern of previous violations. This case illustrates that extending *Canton* so far dissolves municipal into vicarious liability. *See infra* Part II. First, the basic premise of failure-to-train liability—deficient training—was never proven. Despite an absence of classroom-style *Brady* training, Connick's innovative office structure was itself a practical and effective way of monitoring *Brady* compliance, far more so than converting his office into a miniature law school. *See infra* Part II.A. Second, there was no proof of any conscious decision by Connick to ignore obvious *Brady* problems. Far from besmirching Connick's *Brady* record, the evidence showed a minuscule number of reported violations out of tens of thousands of prosecutions during the period covering Thompson's trial. *See infra* Part II.B. Third, the moving force behind the violation

in Thompson's case had nothing to do with any training deficiency in Connick's office. Instead, Thompson's rights were violated when a prosecutor knowingly concealed the blood evidence, a flagrant disregard of the law that Connick had no reason to foresee and no amount of training could have prevented. *See infra* Part II.C.

This case extends failure-to-train liability where it was never meant to go. Years ago, Justice O'Connor warned what would follow: "Allowing an inadequate training claim such as this one to go to a jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). So far, this case has fulfilled Justice O'Connor's prediction. The Court should overturn that result by clarifying that single-incident liability does not extend to a prosecutor's *Brady* violation.

ARGUMENT

I. A DISTRICT ATTORNEY'S OFFICE MAY NOT BE LIABLE UNDER § 1983 FOR FAILING TO TRAIN PROSECUTORS ON *BRADY*, ABSENT A HISTORY OF VIOLATIONS.

A municipality is liable under § 1983 only for its own actions, and not for actions by its employees. *See, e.g., Bryan County*, 520 U.S., at 403; *Monell*, 436 U.S., at 690-94. A municipality acts illegally when its own policy is unconstitutional, or its policymaker orders illegal action. *Bryan County*, 520 U.S., at 404-05; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). Finding municipal

action is far more difficult, however, when liability is premised on a municipality's *failure* to act that supposedly causes an employee to inflict injury. *Bryan County*, 520 U.S., at 406; *see also City of Springfield v. Kibbe*, 480 U.S. 257, 268 (1987) (O'Connor, J., dissenting) (describing the causal connection as "an inherently tenuous one"). In such cases, "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bryan County*, 520 U.S., at 405 (citing *Canton*, 489 U.S., at 391-92; *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) (plurality opinion)).

Those rigorous standards govern claims alleging a municipality has inadequately trained its employees. *See generally Canton*, 489 U.S., at 390-92. It is not enough to show that an employee was poorly trained, that better training would have thwarted his bad act, or that "an otherwise sound program has occasionally been negligently administered." *Id.*, at 390-91. Rather, inadequate training must demonstrate a municipality's "deliberate indifference"—its callous and conscious disregard for rights. *Id.*, at 388-89 & n.7; *Bryan County*, 520 U.S., at 407. Additionally, an identified flaw in training must "actually cause" the particular injury. *Canton*, 489 U.S, at 391; *Bryan County*, 520 U.S., at 404. "Where a court fails to adhere to rigorous requirements of causation and culpability, municipal liability collapses into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

Failure-to-train liability ordinarily requires an underlying pattern of employee wrongdoing. *Bryan County*, 520 U.S., at 409. Otherwise, a municipality's mere failure to adjust its training would not ordinarily show deliberate indifference, nor directly cause employee wrongdoing. *See, e.g., id.*, at 407 (explaining that "[i]f a [training] program does not prevent constitutional violations, municipal decisionmakers *may eventually* be put on notice that a new program is called for") (emphasis added). Culpability and causation thus generally require proving a municipality's "continued adherence" to training whose flaws are exposed by repeated wrongdoing. *Id.*, at 407 (citing *Canton*, 489 U.S., at 390 n.10).

In "a narrow range of circumstances," however, liability may be premised on an employee's single violation. *Bryan County*, 520 U.S., at 409. The theory emerges from this hypothetical in *Canton*:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officer with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S., at 390 n.10 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). Single-incident liability was thus posed as a situation that glaringly demands

targeted training because, without it, violations are inevitable. A city that blindly relies on armed officers' ability to obey the constitution announces a callous indifference that needs no confirmation by a history of incidents. The Court has never expanded this hypothetical, however, nor actually held a municipality liable under it. *See Bryan County*, 520 U.S., at 409 (noting that *Canton* had "simply hypothesized" its single-incident scenario).

This case asks whether *Canton*'s single-incident hypothesis may be pushed from police to prosecutors. Specifically, it raises the question whether a district attorney's office shows deliberate indifference by failing to formally "train" prosecutors to comply with *Brady*, where no history of similar violations should have alerted the office to a persisting problem.

For municipal liability purposes, training police officers and prosecutors occupy starkly different realms. Unless a pattern of incidents warns that prosecutors have been violating *Brady*, it is logically impossible for a district attorney's office to *consciously* ignore an obvious need to adjust *Brady* training. The training *Canton* envisioned is, to begin with, ill-suited to a putative failure to "train" prosecutors in their own profession. But basing liability on a single *Brady* violation stretches *Canton* past its breaking point. It transforms *Canton*'s culpability and causation standards into vicarious liability, a result the Court has consistently forbidden since *Monell* and which would therefore contravene § 1983. *See, e.g., Bryan County*, 520 U.S., at 403 (explaining that "[w]e

have consistently refused to hold municipalities liable under a theory of *respondeat superior*").

A. Faced with no history of violations, a district attorney cannot consciously ignore an obvious need for *Brady* training.

(1). District attorneys are entitled to rely on prosecutors' adherence to the standards of their own profession.

Prosecutors are trained professionals, subject to a licensing and ethical regime designed to reinforce their duties as officers of the court. Absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors' adherence to these standards. Making a district attorney liable for failing to "train" prosecutors in their own profession is, consequently, an awkward extension of *Canton* to begin with. Awkwardness becomes absurdity, however, where a pattern of violations has not alerted a district attorney to a persisting problem demanding a specific solution. Finding a failure-to-train under such circumstances divorces the theory from any notion of actual fault and instead imposes liability "*solely* because [the district attorney] employs a tortfeasor." *Monell*, 436 U.S., at 691 (emphasis in original).

The failure-to-train theory emerged solely from police training cases. Thus, while speaking to some extent of training "employees,"[9] *Canton* cast its

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[9] *See, e.g., Canton*, 489 U.S., at 389 (deeming deficient training actionable for "a municipality's failure to train *employees*"); *id.* (observing that *Monell* "will not be satisfied

holding in terms of "police training":

> We hold today that the inadequacy of *police training* may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom *the police* come into contact.

Id., at 388 (emphasis added). The Court in *Canton* drew chiefly from circuit cases considering alleged failures to train police on the standards for arrests,[10] detention and interrogation,[11] searches,[12] and executing warrants,[13] and also cited two of its own cases addressing deadly force training. *See Tuttle*, 471 U.S., at 829-31 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in part

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by merely alleging that the existing training program for *a class of employees, such as police officers*, represents a [city] policy") (emphasis added).

[10] *See Canton*, 489 U.S., at 383 n.3, 387 n.6 (relying on *Rymer v. Davis*, 754 F.2d 198 (CA6 1985); *Hays v. Jefferson Cty.*, 668 F.2d 869 (CA6 1982); *Spell v. McDaniel*, 824 F.2d 1380 (CA4 (1987); *Wierstak v. Heffernan*, 789 F.2d 968 (CA1 1986); *Fiacco v. Rensselaer*, 783 F.2d 319 (CA2 (1986); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (CA11 1985); *Rock v. McCoy*, 763 F.2d 394 (CA10 1985); *Languirand v. Hayden*, 717 F.2d 220 (CA5 1983); *Lenard v. Argento*, 699 F.2d 874 (CA7 1983)).

[11] *See Warren v. City of Lincoln*, 816 F.2d 1254 (CA8 1987).

[12] *See Colburn v. Upper Darby Tp.*, 838 F.2d 663 (CA3 1988).

[13] *See Bergquist v. Cty of Cochise*, 806 F.2d 1364 (CA9 1986). *Canton* also drew on one circuit decision regarding training police to avoid retaliatory prosecution. *See Haynesworth v. Miller*, 820 F.2d 1245 (CA DC 1987).

and concurring in judgment); *Springfield*, 480 U.S., at 268-70 (O'Connor, J., joined by Rehnquist, C.J., and Powell and White, JJ., dissenting). *Canton* itself involved an alleged failure to train police on providing medical attention to detainees. *See* 489 U.S., at 381-82. These sources indicate the genre of "training" uppermost in the Court's mind: instructing police on the constitutional strictures governing their interactions with citizens.

Training police to arrest criminals, however, is a far cry from training lawyers to interpret law. Police officers often need expert guidance on conforming to constitutional rules they themselves have no expertise in finding or interpreting. In those cases, officers require specialized training from their employer. Thus, *Canton* plausibly hypothesized liability for a municipal employer who ignores a glaring need for training officers on constitutional standards.

But prosecutors—and attorneys in general—have a distinctly different relationship to their municipal employers. Attorneys are professionals in the traditional sense of "person[s] ... whose occupation requires a high level of training and proficiency." BLACK'S LAW DICTIONARY (8th ed. 2004). "Training," as Judge Clement's dissent observed, "is what differentiates attorneys from average public employees." Pet. App. 29a. Unlike police officers, prosecutors are extensively educated to discern the constitutional limits on their conduct. Simply to become attorneys, they must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness

standards. *See, e.g.*, LA. SUP. CT. RULE XVII (2010). They are thereafter personally subject to continuing-education requirements and an ethical regime designed to reinforce the profession's standards. *See, e.g.*, LA. SUP. CT. RULE XXX (2010). As attorneys, prosecutors are officers of the court,[14] and accordingly have a "duty to seek justice, not merely to convict." ABA STANDARDS FOR CRIMINAL JUSTICE 3-1.1(b) (2d ed. 1980).

Violating these obligations subjects lawyers to severe consequences. They may be suspended or disbarred by the profession's governing body. *See, e.g., Hernandez v. Mukasey*, 524 F.3d 1014, 1019 nn.1 & 2 (CA9 2008) (discussing varied state regulation of the legal profession). They may face contempt sanctions. Indeed, one of the prosecutors involved in the suppression in Thompson's robbery trial was disciplined by the Louisiana Supreme Court at the instigation of Connick himself. *See In re Riehlmann*, 2004-0680 (La. 1/19/05); 891 So.2d 1239; App. 365-67.

This Court routinely recognizes these professional standards. Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be

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[14] As Justice Cardozo (then-Chief Judge of the New York Court of Appeals) once noted: "Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487 (1928).

exacted ... qualities of truth-speaking, of a high sense of honor, of granite discretion." *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 247 (1957). The landmark *Strickland v. Washington* opinion presupposed attorneys' professional obligations, including "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 688 (1984); *see also Hernandez*, 524 F.3d, at 1018-19 (contrasting attorneys and non-lawyer immigration consultants). Justice O'Connor, dissenting from a decision to strike down certain state bans on lawyer solicitation, noted that, "[w]hile some assert that we have left the era of professionalism in the practice of law..., substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 677 (1985) (O'Connor, J., dissenting) (internal citation omitted).

Bearing in mind this overarching professional regime, it is implausible to charge a district attorney's office with precisely the same duty to "train" prosecutors that *Canton* recognized with respect to police officers. *Canton* itself does not suggest that *every* employment relationship triggers an equivalent training duty for which a municipality may be liable. *See, e.g.*, 489 U.S., at 387 (holding "there are *limited circumstances* in which ... a 'failure to train' can be the basis for liability under § 1983"); *id.*, at 390 (explaining that liability may arise "in light of the duties assigned to *specific officers or employees*") (emphases added).

As Judge Clement explained, "it is highly unlikely that a municipality could be held liable for failing to train a doctor it employed in diagnostic nuances." Pet. App. 29a. In the same way, prosecutors have an orientation to the laws governing their duties fundamentally different from typical municipal employees.

Prosecutors should therefore not be lumped unthinkingly under *Canton*'s stringent fault standard, as though they were any other employee. "To hold a public employer liable for failing to train professionals in their profession is an awkward theory," as Judge Clement aptly observed. Pet. App. 29a. The theory is indeed awkward that puts a district attorney in the position of crafting a "training program" to prevent lapses by employees already professionally trained to detect and avoid them.

Canton does not direct a municipality to undertake such an overbroad and likely counter-productive approach to training. *Cf. Canton*, 489 U.S., at 392 (cautioning that diluting failure-to-train liability would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs"). Rather, a training program may trigger liability only when, in light of particular employees' duties,

> the need for more or different training is *so obvious*, and the inadequacy *so likely* to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need.

Canton, 489 U.S., at 390 (emphasis added). One strains to imagine, however, when it should *ever* be "obvious" to a district attorney that he needs to train prosecutors to know and obey the law. The opposite is true. Absent powerful indications to the contrary, a district attorney "is entitled to assume that attorneys will abide by the standards of the profession." Pet. App. 29a.

In sum, *Canton*'s training duty grew out of the police context and extends awkwardly to professionally trained employees such as prosecutors. Its only conceivable application to a putative failure to "train" prosecutors, then, is when a history of violations alerts the office to a specific problem that demands a targeted solution. Only that approach takes *Canton*'s stringent fault standard seriously. Only then can a district attorney plausibly be accused of a "continued adherence to an approach that [it] know[s] or should know has failed to prevent tortious conduct by employees." *Bryan County*, 520 U.S., at 407. Reading *Canton* any other way would unmoor it from *actual* municipal fault and would essentially direct district attorneys, on pain of § 1983 liability, to run their offices like a law school, a board of ethics, or a bar association.

(2). Canton's *single-incident scenario is nothing like a* Brady *situation.*

Given the implausibility of holding a district attorney culpable for not "training" prosecutors on what they are already equipped to know and do, one wonders what theory allowed Thompson's case to survive a motion to dismiss. It was this: the

lower courts equated prosecutors' *Brady* compliance to the extreme scenario *Canton* had hypothesized for single-incident liability. The lower courts thus expanded single-incident liability far beyond anything *Canton* envisioned.

Failure-to-train liability ordinarily requires an underlying history of employee wrongdoing. *See, e.g., Bryan County*, 520 U.S., at 409. Otherwise, a municipality's failure to adjust training would seldom indicate its "continued adherence to an approach that [it] know[s] or should know has failed to prevent tortious conduct by employees." *Id.*, at 407 (citing *Canton*, 489 U.S., at 390 n.10). An employee's single violation would therefore establish municipal failure-to-train liability only in the rarest case. The Court has imagined only one: an excessive force violation that occurs because a city has passed out guns to officers but forgotten to train them on using deadly force. *Canton*, 489 U.S., at 390 n.10 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

The Court has shown no inclination to expand this hypothetical and, indeed, has never actually held a municipality liable under it. *See Bryan County*, 520 U.S., at 409 (explaining that *Canton* had "simply hypothesized" single-incident liability for a "narrow range of circumstances"). *Canton*'s extreme police-training scenario thus remains the lone benchmark for single-incident liability. The key question is whether it plausibly extends to a district attorney's office that fails to "formally train" prosecutors on *Brady*.

Both lower courts concluded that it does, but only by abstracting the hypothetical from its peculiar facts. *See* Pet. App. 72a-80a, 141a-142a. For instance, the district court found the *Brady* scenario implicated single-incident liability because the office "knew to a moral certainty" that prosecutors would acquire *Brady* material; because "without training it is not always obvious what *Brady* requires"; and because withholding *Brady* material "will virtually always lead" to constitutional violations. *Id.* at 141a. The panel opinion relied on the same reasoning, along with expert testimony that "[e]very district attorney knows" that prosecutors will acquire *Brady* material and that not disclosing it will violate constitutional rights. *Id.* at 76a-79a.[15]

Both courts patterned their analysis on the Second Circuit's opinion in *Walker v. City of New York*, 974 F.2d 293 (CA2 1992), which had first suggested that single-incident liability may apply to a *Brady* violation. *See* Pet. App. at 142a, 80a (both citing *Walker*). The jury instructions were also drawn directly from *Walker*. To assess Connick's deliberate indifference, the jury was asked to consider:

1) whether "the district attorney was certain that prosecutors would confront" *Brady* decisions;

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[15] The panel added the details that certain prosecutors testified that *Brady* had "gray areas" or was "an elastic thing," and that many prosecutors "were only a few years out of law school." *Id.* at 77a-78a.

2) whether those situations "involved a difficult choice or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed"; and

3) whether "the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights."

App. 828.

Based on this chain of reasoning, both lower courts ruled that a district attorney's purported failure to train on *Brady* fell within *Canton*'s single-incident scenario. *See, e.g.*, Pet. App. 80a (concluding that "Thompson did not need to prove a pattern of *Brady* violations to demonstrate that [Connick's] failure to train was deliberately indifferent"). The jury was thus explicitly allowed to base deliberate indifference on a *Brady* violation unaccompanied by any pattern. To be sure, that was the only basis on which the jury *could* have found culpability, since, as the panel explained, "Thompson did not establish a pattern of *Brady* violations" and indeed "d[id] not argue that there was evidence of a pattern." *Id.* at 76a, 72a.[16]

The analysis adopted by the lower courts to shoehorn *Brady* into single-incident liability was grievously flawed. It illogically expanded the

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[16] Furthermore, as explained in Part II.B, *infra*, the evidence adduced at trial did not permit any inference of the "pattern of constitutional violations" typically required to prove failure-to-train liability.

"narrow range" of single-incident circumstances far beyond anything *Canton* could have envisioned. Under this approach, a district attorney's liability for "training" is indistinguishable from vicarious liability.

The lower courts' chief mistake was to divorce *Canton*'s hypothetical from its facts. *Canton* imagined an extreme case in which city police officers find themselves with new firearms but no indication how to use them legally. By contrast, the lower courts merely asked whether municipal employees face a situation that "presents a difficult choice" that "will frequently cause" constitutional violations. That abstraction scarcely does justice to *Canton*'s hypothetical, which dealt not with "difficult choices" that "frequently" cause violations, but with impossible choices that inevitably cause them. *Canton*'s untrained officers were essentially asked to intuit deadly force standards. Saying they faced a "difficult choice" hardly captures the problem. A municipal employer who places its officers in that dilemma is, by definition, callously indifferent to the rights of citizens those officers will apprehend.

Going well beyond that scenario, the lower courts expanded single-incident liability to a far broader and more commonplace range of employee missteps. For a district attorney's office, such liability would extend not only to *Brady*, but also prosecutors' decisions on "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." Pet. App. 27a. This converts a rare form of municipal

liability into the norm, with particularly ruinous implications for prosecutorial offices.

The lower courts simply missed the obvious: failing to train police officers to arrest criminals is nothing like "failing to train" prosecutors to interpret the law. The former shows callous indifference, the latter a sensible reliance on professional safeguards. By sending Thompson's case to the jury without any proof of a history of similar violations, the lower courts expanded single-incident liability far beyond the "narrow range" *Canton* and *Bryan County* delineated, and thus breached the high wall around failure-to-train liability. The consequences were predictable: "Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

B. Faced with no history of violations, a district attorney's *Brady* training cannot be the moving force behind a violation.

Because the causal link in such cases "is an inherently tenuous one," *see Springfield*, 480 U.S., at 268 (O'Connor, J., dissenting), the Court has underscored that a failure-to-train claim demands an ironclad connection between an injury and a flawed training program. The Court has recited a litany of warnings to this effect. "[T]he identified deficiency in a city's training program," *Canton* said, "must be closely related to the ultimate injury" and must have "actually caused" it." 489 U.S., at 391. But-for causation is insufficient.

Bryan County, 520 U.S., at 410. Rather, a "direct causal link" must exist between training and injury, and a pattern of violations is usually necessary to prove it. *Id.*, at 404, 407-08. It is not enough to show that a program has sometimes been badly supervised, or that certain employees could have been better equipped to avoid the misconduct. *Canton*, 489 U.S., at 391. The "moving force" behind the injury must be the training program *itself*, and not "factors peculiar to the officer involved in the particular incident." *Bryan County*, 520 U.S., at 407-08.

A purported flaw in a district attorney's system of *Brady* compliance—such as a lack of "formal" training—cannot typically be the moving force behind a *Brady* violation for two reasons. First, the far more obvious cause of a violation lies with the professionally trained prosecutor himself. The only thing that could conceivably change this calculus is a history of *Brady* violations sufficient to alert a district attorney to a problem that demands a targeted solution. Second, the extreme police-training failure in *Canton*'s single-incident hypothesis does not remotely embrace the *Brady* scenario faced by a professionally trained prosecutor.

In most cases, what *actually* causes a *Brady* violation is the prosecutor himself. Many things might explain the lapse. The prosecutor may have simply neglected his duties. He may have made a mistake about the materiality of particular evidence. *See, e.g., United States v. Bagley*, 473 U.S. 667 (1985) (defining materiality with respect

to impeachment evidence). He may have had a defective understanding of *Brady*. He may have been misinformed about the existence of evidence because of his own laziness or the police's. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (explaining that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Conceivably, an office's structural mechanisms might have failed in a given case. Normal checks and balances may not have functioned properly. Evidence might have slipped through the cracks in an otherwise reliable system. *See, e.g., Strickler v. Greene*, 527 U.S. 263 (1999) (involving undisclosed potential *Brady* material that surfaced after trial despite open file policy). And, of course, one must not rule out the disturbing scenario that unfolded in Thompson's case: a prosecutor may have knowingly buried *Brady* material. *See, e.g., Banks v. Dretke*, 540 U.S. 668 (2004) (involving suppression of impeachment evidence that would have revealed government coaching of witness).

Consequently, someone investigating a *Brady* violation would suspect, first and foremost, that the prosecutor betrayed *his own* professional standards—*not* that he should have received better training from the district attorney. By definition, a prosecutor is a licensed professional already equipped to assess what to do with potential *Brady* material. *See supra* Part I.A.1. Only in the most unusual case would a *Brady* violation be traced to anything other than an individual prosecutor's lapse of judgment.

Thus, the same reasons that counsel against attributing the requisite fault to a district attorney for a prosecutor's single *Brady* violation, *see supra* Part I.A, also counsel against finding the requisite causation. There is little reason to think that a district attorney's inadequate training *actually* causes a professional to betray the standards of his own profession. None of the plausible explanations for a *Brady* violation—a prosecutor's mistake, for instance, or faulty administration of an office system—establish a direct link between the injury and deficient training. Accurately diagnosed, the moving force will instead be "factors peculiar to the officer involved in the particular incident." *Bryan County*, 520 U.S., at 408.

Causation becomes even more tenuous when a *Brady* violation results not from a prosecutor's negligence—or even recklessness—but instead from his intentional misdeed. By analogy, a municipality's inadequate sexual harassment training cannot have been the moving force behind a police officer's rape of a detainee.[17] As one court explained, "while it may have been wise to tell officers not to sexually assault detainees, it is not so obvious that not doing so would result in an officer actually sexually assaulting a female detainee." *Parrish*, 594 F.3d, at 999. For the same reasons, whatever insufficient *Brady* training a district attorney's office may have provided could

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[17] *See, e.g., Andrews v. Fowler*, 98 F.3d 1069 (CA8 1996); *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (CA11 1997); *Currie v. Haywood County*, 2007 WL 1063277, 4 (CA6 Apr. 10, 2007); *Parrish v. Ball*, 594 F.3d 993, 999 (CA8 2010).

not directly cause a prosecutor's knowing violation of *Brady*.

In sum, nothing about a *Brady* violation suggests that it escapes the rule that a "pattern of injuries [is] ordinarily necessary to establish municipal culpability and causation." *Bryan County*, 520 U.S., at 409. *Canton*'s single-incident hypothesis confirms this. In that scenario, the city employer had no reason to think officers are equipped to interpret or even locate the proper constitutional standards for deadly force. *See* 489 U.S., at 390 n.10. Denying police officers those "specific tools," the Court explained, will lead to constitutional violations "with a high degree of predictability." *Bryan County*, 520 U.S., at 409-10. A resulting excessive force injury can therefore be directly linked to the city's lack of training. *See supra* Part I.A.2 (discussing *Canton*'s single-incident hypothesis).

A chasm lies between that scenario and a prosecutor's *Brady* violation, however. Unlike police officers, prosecutors are professionally trained to understand what *Brady* requires of them. *See supra* part I.A.1. A district attorney reasonably relies on their ability and integrity. That a district attorney may not provide "formal" *Brady* training to reinforce prosecutors' professional acumen does not, by any stretch of the imagination, put him in the same category as the city official who hands out firearms to untrained officers and hopes for the best.

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As Justice O'Connor predicted years ago, "[a]llowing an inadequate training claim such as this one to go to the jury based on upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). Absent a history of similar incidents, a prosecutor's *Brady* violation simply does not support an inference of culpable municipal action that *Monell* and *Canton* require. The facts of this case, as discussed below, illustrate that stretching single-incident liability to include this kind of employee malfeasance will dissolve the distinction between municipal and vicarious liability and "open municipalities to unprecedented liability under § 1983." *Canton*, 489 U.S., at 391.

II. THIS CASE EXEMPLIFIES THE DANGERS OF EXPANDING FAILURE-TO-TRAIN LIABILTY TO A PROSECUTOR'S *BRADY* VIOLATION.

The facts of this case highlight the flaws of extending failure-to-train liability to a *Brady* violation. First, they reveal how awkward the notion is of "training" prosecutors in their own profession. Despite not having formalized *Brady* instruction, Connick's office structure was itself a practical and effective way of monitoring *Brady* compliance—far more so than converting his office into a miniature law school. Second, the facts show how *Canton*'s rigorous fault standard was diluted. The office was found liable without proof of any conscious decision by Connick to ignore obvious or persisting problems with *Brady*. Third, the facts show how *Canton*'s stringent causation

requirement was bypassed. The moving force behind Thompson's violation had nothing to do with a putative training deficiency in Connick's office. Instead, Thompson's rights were violated when a prosecutor knowingly concealed the blood evidence.

This case thus demonstrates the inevitable consequence of expanding *Canton*'s single-incident theory to include a district attorney's putative failure to train prosecutors on *Brady*. The office will be held liable "*solely* because [it] employs a tortfeasor." *Monell*, 436 U.S., at 691 (emphasis in original).

A. Connick's system of checks and balances was a sensible way of approaching *Brady* compliance.

By the time of the violation in this case, Connick had already instituted a practical and effective system for monitoring prosecutors' compliance with *Brady*. Connick's system did not comfortably equate to a "training program" under *Canton*, but that is just the point. As explained above, *Canton* applies awkwardly to training prosecutors in their own professional obligations to begin with. *See supra* Part I.A.1. Yet Thompson's case proceeded on this implausible basis. He could therefore sidestep evidence of the office's compliance mechanisms and claim instead that a lack of "formal *Brady* training" showed Connick's deliberate indifference. Thompson was thus allowed to argue a failure-to-train claim without even establishing the basic premise that there was

inadequate training to begin with.[18]

The reality was quite different. Despite an absence of classroom-style training, Connick introduced numerous structural measures designed to instruct and monitor prosecutors:

- He revolutionized the "screening" process.
- He established a system of junior and senior prosecutors in each court section.
- He created an in-house system of "pre-trying" cases.
- He instituted regular sessions for review of cases and for specialized instruction.
- He fostered the circulation of advance sheets and intra-office memoranda highlighting developments in criminal law.

Beginning in 1974, then, Connick oversaw the evolution of a "system of tremendous checks and balances" designed to reinforce his prosecutors' compliance with their legal and ethical obligations. App. 425-30, 460-63; *see generally supra* Statement, Part A.

Prosecutors' *Brady* compliance was therefore not left to chance. The office compliance structure was designed to—and actually did—address *Brady*. To be sure, no conceivable system could monitor

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[18] *See, e.g., Canton*, 489 U.S., at 390 (explaining that "[t]he issue in a case like this one ... is whether that training program is adequate"); *Bryan County*, 520 U.S., at 411 (assuming that "a jury could properly find ... that Sheriff Moore's assessment of Burns' background was inadequate").

every one of the thousands of *Brady* decisions prosecutors would make in a given year. And yet *Brady* was reinforced at multiple levels by the office-wide supervision and instruction that Connick instituted. Specific *Brady* questions would pass initially through screening and proceed—along with myriad other issues requiring prosecutors' judgment—up the chain through an investigator, a junior prosecutor, and a senior prosecutor. Internally supervised "pre-trials," weekly trial division meetings, and regular intra-office memoranda would each flag *Brady* issues and highlight doctrinal developments. Connick himself instituted or refined each of these mechanisms. *See generally supra* Statement, Part B.

Thompson was never required to prove that these practices were inadequate. Instead, he proceeded on the facile assumption that Connick's training *must* have been flawed because there were no "formal" training sessions addressing *Brady*. The lower courts accepted this premise. The district court reasoned that "no deponent could identify any training sessions on *Brady*," and that "several deponents conceded that they were not formally trained, and that no one in the office received formal training." Pet. App. 140a. The panel agreed. Pet. App. 89a-91a. This simplistic view made "inadequate training" a foregone conclusion: the petitioners themselves stipulated there were no formal *Brady* training sessions. App. 27.

The lower courts uncritically assumed that the kinds of training lapses for which municipalities

may be liable under *Canton* apply to a district attorney's purported duty to train prosecutors on their professional obligations. This case shows just how flawed that premise is. Connick more than responsibly fulfilled his institutional role as a district attorney by overhauling how his office was structured and how his prosecutors were supervised and instructed. At the same time, however, Connick was "entitled to assume that attorneys [would] abide by the standards of the profession." Pet. App. 29a. *Canton* did not impose on Connick an obligation to run his office as if it were a law school, a board of ethics, or a bar association. Only by taking such an unrealistic view of *Canton* could Connick be held liable for a failure to sponsor formal *Brady* training sessions.

B. The evidence showed no deliberate choice by Connick to ignore an obvious *Brady* compliance problem.

The expansion of *Canton*'s single-incident theory to this case resulted in imposing liability under a diluted fault standard. The evidence failed to demonstrate any conscious decision by Connick to ignore obvious or persisting problems with *Brady* compliance, which is precisely the kind of fault *Canton* demands. Nothing better illustrates that this case should never have been treated under the single-incident hypothesis to begin with.

Heightened culpability demands, as Judge Clement's dissent explained, that Connick ignored an obvious need to train prosecutors about the undisclosed evidence at issue. Pet. App. 14a-18a, 22a-24a. After all, *Canton* was premised on failing

to train an officer, not on the general requirements of his position, but rather on a "specific skill necessary to the discharge of his duties." *Bryan County*, 520 U.S., at 410. *Canton*'s single-incident hypothesis is even more context-specific. It depends on "[t]he likelihood that a situation will recur and the predictability that an officer lacking *specific tools to handle that situation* will violate citizens' rights." *Id.*, at 409 (emphasis added).[19] Thus, the correct fault inquiry is not whether the office failed to train prosecutors about "*Brady* in general," which would be like asking whether the city in *Canton* failed to train officers about "arrests in general." Rather, the right question is whether Connick consciously "fail[ed] to train [prosecutors] on how to handle specific types of evidence such as the crime report at issue." Pet. App. 24a.[20]

The evidence showed nothing approaching such fault on Connick's part, and indeed it demonstrated quite the reverse. As Judge Clement emphasized, in thousands of cases handled by Connick's office in the decade preceding Thompson's violation, "only four convictions were overturned based on *Brady* violations ... and there was not a single instance involving the failure to disclose a crime lab report

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[19] *See also Canton*, 489 U.S., at 389 (describing a municipality's "failure to train its employees *in a relevant respect*") (emphasis added).

[20] *Cf. Walker*, 974 F.2d, at 300 (reserving question of how deliberate indifference applies "with respect to other kinds of exculpatory evidence").

or other scientific evidence." Pet. App. 25a.[21] Connick himself testified about these isolated incidents, App. 436-37, 452-53, and Thompson did not attempt to argue that they formed a "pattern of constitutional violations"[22] with the incident in his case. *See, e.g.*, Pet. App. 72a (explaining that "Thompson does not argue that there was evidence of a pattern").

Far from casting doubt on Connick's *Brady* record, the one circuit decision to scrutinize his record actually *approved* it. In *Cousin v. Small*, the Fifth Circuit surveyed the period covering Thompson's violation and found Connick's "enforcement of the [*Brady*] policy was not patently inadequate or likely to result in constitutional violations." 325 F.3d 627, 637-38 (CA5 2003). Given the high caseload in Connick's office during that period, the court

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[21] *See State v. Perkins*, 423 So.2d 1103, 1105-08 (La. 1982) (overturning conviction based on failure to disclose exculpatory witness statement); *State v. Curtis*, 384 So.2d 396, 397-98 (La. 1980) (overturning conviction for failure to disclose impeachment evidence); *State v. Evans*, 463 So.2d 673, 675-76 (La. App. 4 Cir. 1985) (ordering trial judge on remand to inspect obscured page of coroner's report to determine if it contained *Brady* material); *State v. Rosiere*, 476 So.2d 816, 820 (La. App. 4 Cir. 1985) (noting failure to disclose two exculpatory witness statements).

[22] *See, e.g., Canton*, 389 U.S., at 397 (O'Connor, J., concurring in part and dissenting in part) (observing that failure-to-train liability may exist where "policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion").

> agree[d] with the [district] court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's deliberate indifference to violations of *Brady* rights.[23]

Id. Thompson's evidence did not add anything to contradict the Fifth Circuit's conclusion about Connick's *Brady* record.

To finesse the absence of persistent *Brady* infringement in Connick's office, Thompson adduced evidence purportedly showing that the same group of prosecutors withheld other *Brady* material in his murder trial. *See, e.g.*, Pet. App. 22a n.41 & 38a n.67 (discussing and rejecting this argument). The problems with this argument were manifold, however. First and foremost, even assuming other *Brady* violations occurred in his subsequent trial, they could not substitute for the "pattern of constitutional violations" ordinarily required by *Canton* and *Bryan County*. Such a "pattern" refers to a history of *prior* violations a training program has failed to prevent, such that "municipal decisionmakers may eventually be put

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[23] Judge Prado's panel opinion distinguished *Cousin* on the ground that the plaintiff had conceded that Connick's *Brady* training was adequate in 1995, which "says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985." Pet. App. 88a-89a. But that misses *Cousin*'s significance. As Judge Clement explained, *Cousin* "sustained the district court's conclusion that twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) reveal no pattern of *Brady* violations." Pet. App. 25a.

on notice that a new program is called for." *Bryan County*, 520 U.S., at 407.[24] Moreover, even on their own terms, Thompson's alleged additional violations had no connection to what led to the blood suppression. They instead concerned disputes about the materiality of inconsistent witness descriptions and impeachment evidence. *See, e.g.*, App. 293-306, 312-336. Thus, even if such non-disclosures occurred and violated *Brady*, they did not establish the sort of pattern that could support a finding of heightened culpability.

Even more fundamentally, these alleged non-disclosures have never been adjudicated *Brady* violations to begin with. To the contrary, many of them—*i.e.*, claims that suppressed evidence showed witness bias—were rejected in Thompson's federal habeas proceedings. *See Thompson v. Cain*, 161 F.3d 802, 805-08 (CA5 1998); *Thompson v. Cain*, 1997 WL 79295, at *9-*19 (E.D. La. Feb. 24, 1997) (unpublished); *see also* Pet. App. 22a n.41 (discussing these adjudications). Others were simply presented as disconnected facts in Thompson's civil rights case. *See, e.g,* App. 94-108, 210-215, 220-22, 293-306, 312-36. The jury, however, was instructed only that the blood suppression violated *Brady* as a matter of law, and not whether other claimed non-disclosures violated *Brady*. Instead, the jury was merely told it was "not limited to the nonproduced blood evidence" in

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[24] *See also id.* (explaining that municipal decisionmakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish" deliberate indifference).

assessing Connick's fault. *Compare* App. 825 *with* App. 826.[25]

Whether a particular non-disclosure violates *Brady* is a legal question a jury cannot determine. *See, e.g.*, *United States v. Oruche*, 484 F.3d 590, 595-96 (CA DC 2007) (explaining that "once the existence and content of undisclosed evidence has been established, the assessment of [its] materiality ... under *Brady* is a question of law"). In a failure-to-train case, then, only courts are equipped to assess whether a plaintiff has shown additional constitutional violations and whether they constitute the pattern *Canton* and *Bryan County* require. Here, indeed, when the lower courts squarely addressed that issue, both ruled that Thompson's case should be exempted from the typical pattern requirement.[26] Those rulings would

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[25] The district judge was unclear about why the jury was allowed to consider additional alleged non-disclosures in the murder trial. While explaining to counsel that he "was not going to ask the jury ... was this other stuff also *Brady*," the judge said he would allow it to prove "the cumulative nature of and impact [of] evidence, that is, ... whether or not it all goes to the training and deliberate indifference arguments." Transcript Vol. IV, p. 1003. Thompson's counsel urged, somewhat differently, that the evidence "reflected on the adequacy of the training *or whether there was a pattern or a policy*." *Id.* at 1004 (emphasis added). When petitioners' counsel urged an instruction that "deliberate indifference to training requires a pattern or similar violations and ... more than a single isolated act," Thompson's counsel flatly stated, "That's not the law," and the court rejected the proposed instruction. *Id.* at 1013.

[26] *See, e.g.*, Pet. App. 76a (finding that "the evidence developed at trial clearly demonstrates that this case falls within the ... narrow range of situations that do not require a

have been nonsensical had the courts thought Thompson's supposed additional violations established a pattern. In fact, the panel confirmed that "Thompson did not establish a pattern of *Brady* violations by the DA's Office." Pet. App. 76a.

Since Thompson could not prove a genuine pattern, he merely sought to impugn the office's reputation for *Brady* compliance. For instance, Eddie Jordan, the district attorney who succeeded Connick, testified that during Jordan's political campaign "some of the candidates, including myself, raised questions about" Connick's *Brady* record and "thought that ... more could be done." App. 129-30. Jordan justified his opinion, however, only by referring to "several cases that had been reversed" (whose names he could not recall), and by mentioning a study by "[s]ome kind of national group or national report" (which was not part of the record) App. 130, 133. Finally, Jordan referred to a two-page letter from an Orleans criminal court judge—written in 1998, 13 years *after* Thompson's violation—expressing vague concerns about the office's *Brady* record and advocating an open-file policy. App. 133-35.[27]

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pattern of misconduct"); *id.*, at 141a (finding that this case falls within *Canton*'s "so obvious" exception and therefore "a pattern is not necessarily required").

[27] Connick testified that the letter was "very vague ... didn't name anyone ... [and] didn't name any specific transgression." Nonetheless, Connick personally looked into the problem and counseled the prosecutor in the judge's section about managing his caseload. App. 434-35.

Thompson also attempted to paint certain statements by Connick and other prosecutors as indicative of a conscious failure to address *Brady* issues. But, as Judge Clement rightly explained, this evidence amounted to no more than "generic generalizations" that "could ... support a deliberate indifference finding against any prosecutor's office for nearly any error that leads to a reversal of a conviction." App. 27a-28a. For instance, the lower courts pointed to evidence that Connick was "aware" prosecutors would "confront *Brady* issues on a regular basis" and that mishandling such issues "would result in constitutional violations." Pet. App. 76a; *see also id.* at 141a. There was also evidence that "many of the attorneys in [Connick's] office were only a few years out of law school." Pet. App. 78a. Finally, some prosecutors testified that *Brady* had "gray areas," *id.* at 77a, and that "*Brady* issues are complex and ambiguous," *id.* at 139a. *See* App. 171, 218-20.

Such evidence proves nothing about the need for targeted *Brady* training in Connick's office, much less Connick's culpable indifference to such a need. That Connick knew prosecutors faced *Brady* issues, and that *Brady* implicates constitutional rights, are stunningly obvious to *any* district attorney. That Connick employed young attorneys as prosecutors is equally unremarkable. Besides, Connick had carefully structured his office precisely to shepherd young attorneys through various levels of responsibility. Finally, the fact that prosecutors thought *Brady* had "gray areas" proved, not that they were unfamiliar with *Brady* but that they were *familiar* with it. As any criminal law

hornbook elucidates, *Brady* has always had "gray areas." *See, e.g.*, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 24.3(b), at 1145 & 1144-50 (5th ed. 2009) (discussing "troublesome issue[s]" persisting under *Brady* and its progeny). Thompson's own expert witness apparently agreed: he explained that "*Brady* is an evolving concept." App. 256.

Thompson's evidence thus suggests exactly nothing about Connick's "indifference" to *Brady*, deliberate or otherwise. If it did, it would impugn *every* district attorney's office and transform *every* discretionary issue their prosecutors confront into a mother-lode of potential liability. And, as Judge Clement pointed out, that liability would not stop with *Brady*, but would include "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, [and] many more." App. 26a-27a.[28]

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[28] Thompson also relied on a 1987 office policy manual, which he claimed confined *Brady*, as a matter of official policy, to exculpatory evidence only. *See, e.g.*, Pet. App. 139a-140a (discussing policy manual). But the jury explicitly rejected the theory that Thompson's violation was caused by official policy. App. 562. Thompson cannot coherently rely on evidence of official policy, then, to establish Connick's failure to train. Furthermore, the one paragraph devoted to *Brady* in the lengthy policy manual does not purport to exhaustively instruct prosecutors about *Brady* legal contours. That is why the same paragraph admonishes that "each Assistant [District Attorney] must be familiar with the law regarding exculpatory information possessed by the State." App. 265.

C. The moving force behind the violation was a prosecutor's knowing misdeed, not Connick's flawed training.

Canton's expansion in this case also resulted in bypassing the stringent causation critical to failure-to-train liability. Thompson's violation was simply not linked to a putative office-wide training deficiency, but instead to a prosecutor's knowing misdeed. Against this reality, Thompson advanced the theory that the suppression was the product of prosecutors' poor *Brady* understanding, which was itself supposedly the product of poor training. Thus did Thompson strive to shoehorn the facts into a failure-to-train. The theory does not fit, however. The evidence may have permitted, at most, the inference that there were four bad apples in Connick's office instead of one. What it did not permit was the transparent fiction that the *Brady* violation had any link to poor training.

As already explained, failure-to-train demands an ironclad connection between an injury and a deficient training program, because the causal link in such cases "is an inherently tenuous one." *Springfield*, 480 U.S., at 268 (O'Connor, J., dissenting); *see generally supra* Part I.B. Thompson had to prove that the moving force behind his injury was prosecutors' confusion about how *Brady* applied to the undisclosed report *and* that their confusion was directly linked to Connick's training system. It was not enough to show diffuse uncertainty about *Brady*, nor that certain prosecutors should have been better schooled on *Brady*. *See e.g.*, Pet. App. 32a-33a

(emphasizing the specificity of the causal inquiry). Such evidence could not show that a specific deficiency in office training actually caused what happened. *See, e.g., Canton*, 489 U.S., at 391 (asking whether "the injury would have been avoided had the employee been trained under a program that was not deficient *in the identified respect*") (emphasis added).

Meeting that standard confronted Thompson with a severe challenge. His own attorneys, after all, had uncovered the evidence that shockingly explained what caused his injury. Almost ten years after Thompson's conviction, one of the prosecutors on the robbery case, Gerry Deegan, was diagnosed with terminal cancer and told he had months to live. App. 362. In a bar one night, Deegan confessed to a fellow prosecutor the unconscionable thing he had done to Thompson. *Id.* Deegan had "intentionally suppressed blood evidence" that would have exonerated Thompson for the robbery. App. 367. Soon after that, Deegan died. His confession left it somewhat vague whether any of the other three prosecutors—Whittaker, Williams or Dubelier—were in on the suppression.[29] App. 362. But there was no question that Deegan was unburdening his conscience of something he had knowingly done.

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[29] During a subsequent grand jury investigation initiated by Connick, indictments were prepared against Whittaker and Williams for obstruction of justice. Connick suspended the investigation, however, because he feared that there was insufficient evidence against anyone but Deegan, and that the charges may have prescribed. App. 456.

Deegan's own words proved the violation of Thompson's civil rights. Ironically, however, Thompson's attorneys had to distance his civil rights case from the confession. Their central theory demanded they directly link Thompson's injury, not to a single bad act, but to Connick's failure to train prosecutors *in general*. Any such link would have been obliterated by accepting the plain implications of Deegan's confession. For if Deegan, with or without help, had knowingly suppressed the evidence, then no training flaws Thompson might uncover could have actually caused his injury. Deegan, after all, did not confess to poor training. He did not confess that, a decade later, he achieved a better grasp of *Brady* and realized what he had done. Rather, Deegan came clean because what he had *knowingly* done was gnawing at his conscience.

The alternate theory Thompson settled on was that the four prosecutors withheld the report because they misunderstood their obligation to produce it, and that *Brady* training would have prevented that. Pet. App. 35a-36a. But Thompson supported that implausible version of events merely with a few suggestive answers from individual prosecutors on the stand. For instance, Thompson's attorneys got Williams to fumble over whether *Brady* applied to impeachment evidence and whether it applied to a lab report that was only potentially exculpatory. App. 61-64, 216-18, 229-32. They were able to induce similar confusion from the office representative, Val Solino. App.

248-49, 483-84; Pet. App. 37a-38a.[30] Finally, a prosecutor who later investigated the suppression, Jerry Glas, claimed that Connick had argued with him in 1999 about whether the lab report was *Brady* material. App. 550-51. Connick, of course, denied ever saying any such thing, and insisted that *Brady* obviously covered the report. App. 154.

Skillful cross-examination cannot substitute for actual proof, however. Thompson's evidence may support the inference that prosecutors like Williams or Solino "occasionally make mistakes," or even that they were "unsatisfactorily trained." *Canton*, 489 U.S., at 391. At most, it may have suggested that some unspecified *Brady* problem may have been avoided if those attorneys "had had better or more training." *Id.* But these are black-letter failures to meet *Canton*'s causation standard. Thompson simply failed to adduce the kind of broad, systemic proof *Canton* demands to forge a solid link between an office-wide training deficiency and the suppression in his case.

To find that Thompson proved causation with evidence like this would require stacking one weak inference on top of another. Take, for instance, the possible confusion about *Brady*'s application to impeachment evidence. One would have to assume that passing confusion by two prosecutors on the stand in 2007 actually reflected a far broader misunderstanding in the office over twenty years

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[30] Both witnesses, it should be said, immediately backtracked and stated categorically that both the law and office policy would have mandated turning over the lab report. App. 61-64, 216-18, 229-32, 248-49, 486-89.

before. One would have to assume further that such confusion arose from Connick's failure to train prosecutors. But even assuming all that, the evidence would still fail to establish causation for a simple reason: any purported confusion about impeachment evidence would have been irrelevant to Thompson's *Brady* violation, because the lab report was exculpatory, not impeaching. Thus, even disregarding the most obvious explanation for what happened—that Deegan buried the report—purported confusion about *Brady*'s application to impeachment evidence *could not have caused* the suppression in Thompson's case.

Or take the claimed uncertainty about how *Brady* applied to potentially exculpatory lab reports. One would have to assume that two prosecutors' doubts on the stand in 2007 established systemic confusion in the office in 1985, and, again, that such confusion arose from Connick's training. Or one would have to assume that Connick's alleged argument with a prosecutor in 1999 proved a particular deficiency in the office's *Brady* compliance in 1985. But even these clusters of implausible assumptions would not establish causation.

It was uncontradicted that office policy demanded turning over *all* scientific reports regardless of whether a prosecutor thought a particular report fell within *Brady*. Pet. App. 31a. As Judge Clement explained, even the same witness (Williams) who testified that *Brady* might not reach every report also "stated unequivocally that *all* technical or scientific reports, like the lab

report, were required to be turned over to a defendant." Pet. App. 38a (emphasis in original); *see* App. 63-64, 199-200, 209, 230-32. Solino said the same: he "would have expected a prosecutor to turn that lab report over, period." App. 486. Dubelier, the senior prosecutor on Thompson's murder case, was the most explicit, testifying that he had

> turned over thousands of these type of reports. If I had the report, I would have turned it over. ... [W]e were obligated to turn over a crime lab report. That's the way it was. That was standard operating procedure in the office.

App. 284. There was simply no evidence that a purported confusion about *Brady* could have overridden this consistent office policy of disclosing crime lab reports. Whatever caused the report's suppression in Thompson's case, it could not have been confusion about *Brady*.

Given the inherent weakness of his causation arguments, Thompson was left to insist that the jury could have rejected the theory that a "single rogue prosecutor" was responsible for hiding the evidence. *See* Pet. App. 36a-37a. But Thompson had to do much more than that. He had to forge a direct causal link between the nondisclosure and *office policy*. Thompson did not meet that burden merely by suggesting that three or four prosecutors, instead of just one, were involved. Nor did he meet it merely by suggesting that certain prosecutors should have had a better grasp of *Brady*. Rather, Thompson was required to prove

that a specific, systemic flaw in Connick's approach to *Brady* compliance actually caused the violation in his case. Thompson produced no such evidence, and the wisps of testimony he did produce could not obscure what really happened. A prosecutor—perhaps acting with others, perhaps acting alone—knowingly buried evidence that would have cleared Thompson. Nothing Connick's office did could have conceivably caused that evil act.

*****

Beginning with *Monell*, this Court has cautioned that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, ... on a *respondeat superior* theory." 436 U.S., at 691 (emphasis in original). Both *Canton* and *Bryan County* reissued that warning. *See Canton*, 489 U.S., at 391-92; *Bryan County*, 520 U.S., at 415. Justice O'Connor even predicted that allowing certain inadequate training claims "to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part).

This case is now poised to fulfill Justice O'Connor's prediction. The essence of vicarious liability is to make an employer answerable for an employee's wrongdoing simply by virtue of the employment relationship. That can be the only fair description of the basis for liability in this case. No history of similar violations should have alerted Connick that he needed training targeted to this sort of *Brady* problem. Nothing warned him not to rely on his prosecutors' professionally formed

judgment in obeying *Brady*. And nothing warned him that the existing office policy—to turn over *all* lab reports, regardless of whether they fell under *Brady*—would not resolve exactly the situation presented in a case like Thompson's.

In sum, no evidence showed that Connick had the callous, conscious disregard *Canton* demands. No evidence established a direct link between the mechanisms Connick had instituted for *Brady* compliance and the suppression in Thompson's case. Because Gerry Deegan—the prosecutor who buried the blood evidence—is now dead, the precise events surrounding the suppression are impossible to reconstruct. But one thing is clear: the office's *training policy* did not cause it.

What allowed the lower courts to shoehorn Deegan's knowing misdeed into a "failure-to-train" claim is *Canton*'s single-incident theory—*i.e.*, its suggestion that certain duties so obviously cry out for targeted training that a municipality's failure to do so creates liability, even absent a pattern of violations. *See Canton*, 489 U.S., at 390 & n.10. The Court should clarify what should have been apparent already: *Canton*'s narrow hypothesis has no application to cases like this one. Absent a warning history of particular violations, there can be no obvious need to train prosecutors who are themselves professionally trained to understand and apply the law. Nor could the lack of such training directly cause a prosecutor's intentional violation. No training could prevent such flagrant disrespect for the law by a lawyer himself.

CONCLUSION

The Court should reverse the judgment of the district court and render judgment dismissing respondent's failure-to-train claim.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 09-571

In The
Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether, viewed in the light most favorable to the jury's verdict, there was sufficient evidence for the jury to find (1) that the district attorney was deliberately indifferent to the need to train, monitor, or supervise his prosecutors regarding their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and (2) that the district attorney's deliberate indifference substantially caused the violation of John Thompson's constitutional rights by wrongfully depriving him of his liberty for 18 years and nearly leading him to be executed for crimes he did not commit.

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STATEMENT

This civil rights action arises out of John Thompson's 18 years of wrongful imprisonment and near execution for a murder he did not commit. The jury heard extensive evidence that the Orleans Parish District Attorney's Office—headed at the time by Harry F. Connick—failed to provide *any* training to prosecutors on their obligations to produce favorable evidence to accused citizens under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and subsequent cases. Connick was aware of the need for training, but he was deliberately indifferent to the requirements of *Brady*. The meager guidance he claims to have provided his prosecutors was objectively wrong—and, as his former assistants admitted, would not have required the production of the critical *Brady* evidence that ultimately exonerated Thompson.

Over a four-month period between Thompson's arrest and his separate convictions for capital murder and armed robbery, at least four prosecutors in Connick's office (including the third-highest-ranking assistant district attorney in the office) failed to produce more than a dozen pieces of favorable evidence, including a crime-laboratory report, police reports, witness statements, audiotapes, and other materials that would have been—and, many years after his original conviction, were—pivotal to Thompson's defense. Critically, prosecutors possessed—and did not turn over—blood evidence that conclusively proved Thompson's innocence of armed robbery. When that conviction was dismissed, and, when Thompson

was finally retried in the murder case based on all of the evidence, the jury returned a not-guilty verdict after just 35 minutes of deliberation.

The jury in Thompson's 42 U.S.C. §1983 case concluded that Connick's deliberate indifference to the need to train, supervise, and monitor his prosecutors on *Brady* violated Thompson's constitutional rights, deprived him of his liberty, and very nearly cost him his life. The jury awarded Thompson $14 million in damages—$1 million for each year Thompson spent in solitary confinement for 23 hours a day, seven days a week, in a six-by-nine foot cell on death row in Louisiana's Angola Prison.

1. In December 1984, Raymond T. Liuzza, Jr., a prominent businessman in New Orleans, was killed outside his home. Given the high profile of the crime, the district attorney's office was under considerable pressure to obtain a conviction.

Three weeks later, a college student, Jay LaGarde, and his two siblings were victims of an attempted armed robbery in their car outside the New Orleans Superdome.

In January 1985, Thompson and a co-defendant, Kevin Freeman, were arrested and charged with the Liuzza murder. JA12. When Thompson's photograph appeared in the newspaper following his arrest, the father of the LaGarde children wondered whether this was the man who had robbed his children three weeks earlier. The father contacted the district

attorney's office, and Thompson was charged with armed robbery. JA12-13.

2. The prosecutors "decided to use the armed robbery charge to the State's advantage in the murder case." JA13. They switched the order of the trials so they could secure a conviction for armed robbery and use it against Thompson in the murder case. *Ibid.*

Based solely on the weak identification by the LaGarde children, Thompson was convicted of attempted armed robbery and sentenced to 49½ years in prison. JA15, 523. Unbeknownst to Thompson and his attorneys, the district attorney's office possessed blood evidence that would have exonerated him of the robbery. JA14. At least four prosecutors who worked on Thompson's case—Eric Dubelier, Jim Williams, Bruce Whittaker, and Gerald Deegan—affirmatively knew of the blood evidence. JA15, 48, 189, 280.

Three weeks after the armed-robbery trial, Thompson was tried and convicted of the Liuzza murder. JA16. The prosecutors' strategy of obtaining an armed-robbery conviction worked as planned. JA15-16. Thompson, who was accused at trial of selling the murder weapon and the victim's ring, was effectively precluded from taking the witness stand to explain what really happened—that he had bought the ring and gun from the real killer, Kevin Freeman. JA16. Freeman, meanwhile, was free to testify without contradiction that he saw Thompson shoot Liuzza and that he (Freeman) fled the scene. *Ibid.* At the

penalty phase, young Marie LaGarde testified tearfully in response to Williams's questioning about the separate armed robbery, suggesting that Thompson would have killed her and her two brothers had her older brother not wrestled the gun from the perpetrator. JA689-96. Dubelier then argued that Thompson was already serving a near-life sentence for the armed robbery and urged the jury that the only way to punish him for the murder was to execute him. JA819. The jury sentenced Thompson to death.

3. After years of post-conviction proceedings—including multiple requests for *Brady* material and scientific evidence—a final execution date was set for May 20, 1999. JA17. Just weeks before the execution, Thompson's attorneys independently discovered one of many pieces of evidence that had not been produced to the defense at the time of the original trials: a crime-laboratory report addressed to assistant district attorney Bruce Whittaker. JA17. The report revealed that blood from Jay LaGarde's pant leg—which prosecutors knew came from the perpetrator—had been tested at the prosecutors' request and determined to be type "B." JA14, 17. Whittaker testified he had received the report from the crime laboratory two days before the April 1985 armed robbery trial and placed it on Williams's desk. JA178-79. Nevertheless, it is stipulated that "the prosecutors did not produce any scientific evidence or blood evidence" to Thompson's lawyers in 1985. JA14.

After Thompson's counsel discovered the crime-laboratory report in 1999, Thompson's blood was

tested, and it was determined to be type "O." JA14. Based on that evidence, which proved conclusively Thompson's innocence, the armed-robbery conviction was vacated. Recognizing that the armed-robbery conviction had been used against Thompson to obtain the murder conviction and death sentence, the trial judge stayed Thompson's execution and gave him time to conduct an additional investigation in the murder case. JA17-18.

Once they secured access to the State's files, Thompson's attorneys uncovered considerable information that had not been produced in the murder case, including police reports showing that the perpetrator matched Freeman's description and not Thompson's (JA569); revealing that Freeman had changed his story significantly by the time he testified at the murder trial (JA644, 657); and containing information that would have impeached another State witness based on his efforts to secure a reward in exchange for his testimony. See, *e.g.*, JA620-21, 627-28. The reports also identified witnesses who lived near the scene of the murder and were interviewed by the police but never identified to the defense. JA20-21.

The newly discovered evidence was presented to the jury at Thompson's 2003 retrial, along with testimony from the witnesses the jury had not heard in 1985. JA760-91. Thompson, no longer faced with impeachment by the invalid armed-robbery conviction, explained that he had bought the gun and the ring from Freeman. The jury heard compelling evidence

that Freeman (who was killed in 1995 by a security guard while breaking into parked cars) was the perpetrator of the murder, as he matched perfectly the description of the sole perpetrator contained in non-produced police reports, and his account of the crime was discredited by conflicting statements in the police reports. See, *e.g.*, JA569, 610 (description); JA598 (Freeman mug shot); JA575 (Thompson mug shot).

After deliberating just 35 minutes, the jury returned a "not guilty" verdict. JA19. After spending 18 years wrongfully in prison—including four years *after* his lawyers' discovery of the lab report demonstrating his innocence of armed robbery—Thompson was finally released.

4. Thompson then filed this §1983 action in the Eastern District of Louisiana. The week-long trial presented municipal-liability claims based on the failure of the district attorney, as the official policymaker, to train, supervise, or monitor his assistant district attorneys. The jury heard testimony from 17 witnesses, including Connick, three of his assistant district attorneys who prosecuted Thompson, two former first assistant district attorneys who served under Connick, two other former prosecutors from Connick's office, the then-current district attorney, and several expert witnesses. JA28-565.

The prosecutors who had worked on Thompson's cases did not identify any training whatsoever that Connick provided on a prosecutor's obligation to

comply with *Brady*. Moreover, the office had a presumptive rule of non-production that only evidence legally "required" to be turned over to the defense would be produced—and Connick provided no guidance on what, in fact, was legally "required."

Because none of the former prosecutors testified that Connick had directly instructed his assistants to conceal *Brady* evidence, the jury answered "no" to the question whether the violation of Thompson's rights was caused by an official policy of the district attorney. JA830.

However, the jury also found that Connick was deliberately indifferent to the need to train and instruct his assistants on their obligations under *Brady*, and that his deliberate indifference caused the violations of Thompson's constitutional rights. Specifically, the jury answered "yes" to the following question:

> Was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?

JA830. The jury awarded Thompson $14 million to compensate him for the damage he suffered from his near-executions and the deprivation of his liberty for 18 years for crimes he did not commit. JA831.

5. The jury heard evidence that Connick was the sole policymaker for the office. JA192, 198, 338, 394, 469-70. It also heard direct evidence that even though he was responsible for all policy, including discovery under *Brady*, Connick was deliberately indifferent to his *Brady* obligations.

Connick admitted that he took no steps to familiarize himself with this Court's rulings on prosecutors' obligations to provide evidence to the defense. Although he was the sole policymaker, Connick stated that he "stopped reading law books" in 1974. JA144-45. Moreover, Connick's understanding of *Brady*, as reflected in his testimony and the instructions he claims to have given to prosecutors, was fundamentally wrong. For example, the jury heard Connick's testimony that *Brady* requires only the production of evidence that actually "exculpates the accused" (JA148-49), as opposed to evidence that is merely "favorable" to the defense, which this Court's precedents require be turned over. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150 (1972) (*Brady* requires production of impeachment material).

Connick testified that a *Brady* violation is committed only by *intentional* decisions not to produce evidence, as contrasted with "*inadvertent* conduct of [an] assistant * * * with a lot of case load[.]" JA159 (emphasis added). This testimony is, of course, directly contrary to *Brady* itself, which expressly states that the non-production of favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. He also said,

contrary to this Court's precedents, that prosecutors have no obligation to conduct an independent review of the evidence for *Brady* material, and that the *Brady* obligation does not extend to impeachment or other evidence favorable to the accused. JA148-49, 441.

Connick's deliberate indifference was exemplified by his reaction to this Court's decision in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), which reversed a capital-murder conviction because of *his office's* failure to comply with *Brady*. Ironically, *Kyles* concerned the conduct of Jim Williams, the very same prosecutor who played a leading role in both of Thompson's convictions. Connick conceded that he did not know if he had ever even read *Kyles*, he had no idea that it concerned *Brady*, he did not know it involved Williams, and he made no changes in office policy regarding *Brady* following this Court's reversal. JA152-54.

6. Connick's indifference to *Brady*'s requirements was perhaps most succinctly reflected in the *Brady* section of the office handbook adopted in 1987. Connick and his former first assistants, McElroy and Bane, claimed that the handbook "incorporated" or "codified" prior office memoranda and guidance from Connick that they said were in place during Thompson's 1985 criminal trials. JA392, 449-50, 467-68. The *Brady* section of the handbook consisted of just four sentences:

> In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material—that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce *Brady* material is ongoing and continues throughout the entirety of the trial. Failure to produce *Brady* material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each assistant must be familiar with the law regarding exculpatory information possessed by the State.

JA704.

The handbook misstated the governing legal standard in at least three respects. First, the handbook incorrectly suggested that the obligation to produce favorable evidence was triggered solely by a request from the defense (even though *Brady* has long required prosecutors to turn over favorable information independent of defense requests). Second, it incorrectly suggested that the obligation applies only if the court orders production (even though there has never been such a restriction). Third, it incorrectly suggested that *Brady* is limited to exculpatory evidence (even though, since at least 1972, *Brady* has extended well beyond mere "exculpatory" information

to impeachment and other evidence that is favorable to the defense). JA482.

The handbook's *Brady* discussion was so riddled with error that Val Solino—the district attorney's designated representative whose admissions were binding on the office—expressly conceded that Connick's handbook was deficient as to *Brady*. JA482. Solino also conceded that a prosecutor attempting to follow Connick's guidance in the handbook would not have known to produce the crime-laboratory report. JA483-84. The same is true of the other *Brady* material, including police reports and reward information.

7. Connick's indifference to *Brady* was evident not only through his gross misunderstanding of the law and the deficient supposed guidance embodied in his handbook, but also by his handling of Thompson's case *after* the blood evidence was discovered in 1999. When confronted with documents showing that his prosecutors had failed to produce this critical *Brady* evidence 14 years earlier in Thompson's armed-robbery case, Connick refused to undertake any investigation of the murder case, even though both cases were handled by the same prosecutors and the armed-robbery case was an integral part of the prosecution's strategy in the murder case. JA155-56.

Moreover, although he initially convened a grand-jury investigation into his office's failure to produce the blood evidence (enabling him to conduct his investigation under grand-jury secrecy), Connick eventually squelched even that investigation. JA18. The

May 1999 grand-jury proceedings were led by one of Connick's assistants, John Jerry Glas (JA510), whose testimony at the §1983 trial shed considerable light on Connick's view of *Brady*.

Glas described a 1999 meeting in Connick's office the night before the grand jury was to convene for its second session of testimony. JA538-39. In contrast to Connick's concession throughout this litigation that the crime-laboratory report was *Brady* material,[1] Connick and his first assistant district attorney at the time (McElroy) both stated their views that the crime-laboratory report was *not Brady* material and did *not* have to be produced because, they said, the prosecutors may not have known Thompson's blood type in 1985. JA550-51. The jurors thus heard that what Connick claimed about *Brady* during the 2007 trial differed dramatically from what he said in 1999, when he was still district attorney.

Jurors also heard that Connick buried the truth by shutting down the grand-jury proceedings before

---

[1] See, *e.g.*, Pet. i ("Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963)."); Pet. Br. 57 (citing JA154); see also Pet. 5th Cir. Br. 45 ("Any reasonable prosecutor would have recognized blood evidence as *Brady* material."); Pet. 5th Cir. En Banc Br. 23 ("It would have been obvious to any law school-educated practicing criminal attorney that the blood evidence and corresponding lab report * * * was *Brady* material."); Pet. Mot. for Judgment as a Matter of Law 9 ("[A]ny reasonable prosecutor would have recognized blood evidence as *Brady* material").

all the witnesses had testified. Glas had told Connick he had uncovered evidence of *Brady* violations by *at least three* of Thompson's former prosecutors and that he planned to explore that further with the grand jury. JA537. Over Glas's objection, Connick announced at the meeting that he was shutting down the proceedings and dismissing the grand jury without hearing testimony from the subpoenaed witnesses. JA542.

Glas was so disturbed that he resigned from the office that night, complaining to Connick that: "You're asking me not to show the Grand Jurors evidence in a case in which they are doing a probe into whether DAs hid evidence." JA544. Thompson, meanwhile, spent another four years in jail awaiting an appellate decision granting him a new murder trial, an outcome that Connick fought every step of the way.

8. The jury also heard testimony that Connick's office had a terrible record of complying with *Brady*. Although it was against his interest as then-current district attorney, Eddie Jordan admitted that he questioned whether Connick had done what he needed to do to ensure production of *Brady* material, and he further admitted Connick's *Brady* issues were so significant they had been a campaign topic for contenders vying for the office upon Connick's retirement. JA129-30. Jordan also testified that Connick's policy of not producing police and investigative reports increased the risk of *Brady* violations, and he acknowledged a study finding that Connick's office

had one of the "worst records" of *Brady* compliance in the Nation. JA130-33.

9. Connick's failure to provide accurate *Brady* guidance to his prosecutors about their *Brady* obligations was compounded by his restrictive discovery policy that intensified the risk of *Brady* violations. As Connick and several former prosecutors testified, the presumptive office policy was not to produce police reports and witness statements. JA433. One prosecutor admitted Connick had established a blanket practice of not turning over supplemental police reports and witness statements. JA172. Another prosecutor explained that files obtained from the police containing descriptions and witness statements, reports summarizing police investigations, and other investigative materials were helpful to prosecutors, but not typically turned over to the defense because of Connick's restrictive policy. JA38-40.

In his merits brief, Connick concedes that he adopted a presumption against the production of evidence to the accused: "Connick's disclosure policies were no mystery: turn over what was required by state and federal law, *but no more*." Pet. Br. 6-7 (emphasis added). Although that presumption against production was not unlawful on its face because it did not direct prosecutors to conceal *Brady* evidence, it significantly exacerbated the risk created by the lack of training and the flawed guidance that was supposedly later codified in the handbook. Thompson's expert witness explained to the jury that such presumptions against disclosure were particularly

dangerous given Connick's manifest indifference to *Brady*, the inaccurate *Brady* guidance codified in the handbook, and what several witnesses described as considerable pressure on prosecutors in the office to secure convictions in cases that had already been screened and adjudged trial-worthy. JA190, 256-57.

10. The admissions about Connick's presumption against discovery, his lack of knowledge of *Brady*, and the objectively flawed handbook were accompanied by other admissions that Connick was well aware of the need for *Brady* training and guidance. Connick testified that he was aware of risks created by his policy of presumptive nondisclosure, and he acknowledged the difficulty of some *Brady* decisions. JA151, 449. He conceded that many of his prosecutors lacked experience; that he knew they would come into possession of *Brady* material; that proper *Brady* decisions require a thorough review of the file and an understanding of the scope of *Brady*'s obligations; and that the failure of prosecutors to produce such evidence would violate the constitutional rights of the accused. JA439-42. And he admitted that his policy of presumptive non-production heightened the risk of *Brady* violations. JA159.

Connick was also aware of prior *Brady* violations in his office. He admitted that as of the date of Thompson's trials, there were at least four published opinions from the Louisiana Supreme Court reversing convictions secured during his tenure based on *Brady*

violations. He also admitted that most *Brady* violations never see the light of day, and that there were other unpublished trial court decisions disagreeing with his prosecutors on their *Brady* decisions. JA452-55.

11. Despite all the evidence showing an obvious need, Connick provided *no training or guidance—and certainly no accurate* training or guidance—on *Brady*. In fact, there was no evidence from any witness that Connick ever instructed or trained his prosecutors to do any more than was stated in the four flawed sentences on *Brady* in the handbook.

The parties stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." JA27. Former prosecutor Michael Riehlmann testified that he did not recall that he was "ever trained or instructed by anybody about [his] Brady obligations." JA369. Similarly, Williams and Whittaker testified that they were not trained on *Brady*. JA58, 171. Whittaker elaborated:

> Q. It would have been helpful to have a little training wouldn't it, to kind of show you when you started what the *Brady* rule was so you could deal especially with those gray areas?
>
> A. I think it would be a good thing, yes.
>
> Q. Because there wasn't training, young DAs like yourself were trying cases on their

> own, right? You would be out trying cases right away sometimes?
>
> A. Depending on your level of experience.
>
> Q. And decisions on whether to produce *Brady* material, whether material was *Brady* material and had to be produced, those kinds of decisions would sometimes get made by inexperienced lawyers, just a few weeks out of law school with no training?
>
> A. I imagine that's certainly possible, yes.

JA172. There was no testimony from Thompson's prosecutors that they were ever told to review police reports and witness statements to produce portions containing evidence favorable to the accused, as *Brady* requires, and indeed there was no testimony from these prosecutors that Connick ever stressed the importance of *Brady* compliance. Thus, while two of Connick's former first assistants (McElroy and Bane) suggested that there were periodic training sessions on other topics and various generic checks and balances in the trial process, the jury could have rejected their testimony in its entirety. Moreover, even these witnesses did not identify or describe the *substance* of any actual *Brady* training.

12. Although Connick attempts to confine the constitutional violations to the conduct of a single deceased junior prosecutor (Gerry Deegan), *Brady* violations were committed by every prosecutor involved in Thompson's cases. Multiple prosecutors knew about, but failed to produce, the blood evidence. The

crime-laboratory report showing that the armed robber had type "B" blood was delivered to Whittaker two days before the April 1985 trial. Whittaker testified that he put in on Williams's desk. JA178-79. Although Williams claimed that he did not remember seeing the crime-laboratory report, he admitted he knew about the blood evidence and *deliberately stayed "completely away" from it* in presenting evidence at the armed-robbery trial. JA73, 80-81 (emphasis added). Indeed, grand-jury prosecutor Glas testified that he learned from carjacking victim Jay LaGarde that he had been privately told by the prosecutor who questioned him at trial (Williams) that the test results were "inconclusive." JA526.

The blood evidence had been collected in December 1984, and various police documents identified its existence. JA576, 647. Prosecutor Whittaker wrote on an internal screening action form that the office "may wish to do blood test" on Thompson. That form was then reviewed by Dubelier—the third highest-ranking prosecutor in the office—who admitted he must have known there was blood evidence. JA279-80. The jury thus could reasonably have found that *no fewer than four prosecutors*—Dubelier, Williams, Whittaker, and Deegan—all knew about but failed to produce the blood evidence that would have exonerated Thompson of the robbery. Based on his investigation, grand-jury prosecutor Glas testified that the single rogue prosecutor theory was "ridiculous." JA536.

13. A similar pattern emerged with respect to the nondisclosure of evidence in Thompson's murder

trial. At the outset of the civil trial, the stipulation read to the jury listed 16 exhibits containing favorable information that was not provided to Thompson in 1985. JA20-21.

For example, prosecutors Dubelier and Williams failed to produce police reports with eyewitness descriptions of the murderer that were inconsistent with Thompson's appearance. JA20, 258-59, 569, 612. When confronted with both a description of the perpetrator in the police reports that matched Freeman and an inconsistent mug shot of Thompson taken only six days after the murder,[3] Dubelier claimed he had no obligation to produce the police reports under *Brady* because Thompson still could have been the murderer if he had been wearing his hair differently on the night of the murder. JA140-43. Setting aside the physical impossibility of Dubelier's explanation—that a perpetrator with "close-cut hair" could somehow grow a full "Afro" in six days—Dubelier's answer underscores his total confusion about *Brady* and the indifference to *Brady* that pervaded the office. Under Dubelier's view of *Brady*, if he could conjure up some hypothetical scenario in which the evidence did not conclusively prove Thompson's innocence, he did not have to produce it.

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[3] The police report described the perpetrator as having "close-cut hair." JA102, 612. That fit Freeman perfectly. JA612. Thompson, in contrast, wore his hair in a large "Afro" style. JA575.

Prosecutors Dubelier and Williams failed to produce police reports and witness statements that could have been used to impeach Freeman, the key witness against Thompson. JA20-25. And they failed to produce evidence concerning a reward that was promised and ultimately paid to another witness, Perkins, even though Perkins years later testified without contradiction that the prosecutors told him that he would get a reward. JA20-22, 755-59. Dubelier and Williams ignored defense requests for information about claims on the publicly posted reward and failed to produce the evidence. Williams even argued to the jury in his closing—contrary to fact—that there was no evidence of a reward being sought by or promised to Perkins. JA807-08.

Each assistant district attorney who prosecuted Thompson claimed to have followed what he understood to be the policy of the office and to have followed the rules established by Connick. But no one said that he looked through the 35-page supplemental police report, the witness statements, the police documents showing blood evidence, or the dozens of pages of police "daily" summaries to find evidence favorable to the defense—as prosecutors are required to do in fulfilling their *Brady* obligations.

14. The jury thus had evidence of Connick's stunning misunderstanding of *Brady*, a complete absence of training, objectively flawed supposed guidance codified in the handbook, widespread misunderstanding by the prosecutors regarding the requirements of *Brady*, and the ensuing multiple *Brady* violations by

no fewer than four prosecutors. The totality of this evidence allowed the jury to conclude that this was not an isolated bad act, but a consequence of the policymaker's indifference both to the constitutional duty itself and the need for training. Connick may have told prosecutors to "follow the law," as he and some of his former assistants claimed (JA194, 198), but his patently erroneous understanding and instructions about what the law required reflected his indifference to the constitutional rights of the accused. The result, as reflected in the jury verdict, was the failure to produce critical evidence that would have avoided Thompson's 18 years of wrongful incarceration and near execution.

15. Judgment was entered for Thompson on the verdict, and a panel of the Fifth Circuit unanimously affirmed. Rehearing en banc was granted, thereby vacating the panel opinion. The en banc court evenly divided, resulting in affirmance of the judgment for Thompson.

SUMMARY OF ARGUMENT

The behavior of the prosecutors in this case—from the district attorney on down—shocks the conscience. Four different prosecutors withheld evidence that would have proven John Thompson's innocence, and, as a result, he spent 18 years wrongfully imprisoned and was nearly executed for crimes he did not commit. But for a chance discovery by defense counsel weeks before Thompson's scheduled execution, the

prosecutors' misconduct never would have come to light, and John Thompson would be dead today.

For anyone who believes that capital punishment is a just punishment for the most egregious crimes, the integrity of the system depends on ensuring that the things that occurred here—from the deliberate indifference of the district attorney himself down to the multiple violations by multiple prosecutors—do not happen.

Ever since *Canton*, it has been clear that municipalities can be held liable under §1983 for failure to train employees if that failure reflects a deliberate indifference to an "obvious" risk that constitutional violations will result. These standards are exacting, and the circumstances under which liability has been allowed are narrow.

Connick cynically suggests that upholding liability here will usher in a host of lawsuits against district attorneys across the Nation. But there has been no torrent of judgments against municipalities in the 20 years since *Canton* was decided, and the facts here are—one very much hopes—unique. If ever there were a set of facts justifying an award of damages against a district attorney's office, it is presented in this case. These facts fit the narrow circumstances where liability is altogether justified.

The jury heard exhaustive evidence about the culture of indifference to *Brady* obligations that suffused the district attorney's office. Connick himself

provided direct evidence that he was, quite literally, indifferent to *Brady*. Starting in 1974, he had "stopped reading law books," even though he, alone, made office policy. He completely misunderstood *Brady*'s requirements. He provided no instruction whatsoever to his prosecutors on *Brady*. And he had adopted a presumption of nondisclosure, so that prosecutors could turn over only what was legally required, and no more.

Indeed, Connick's indifference was so deep that he did not even know if he had ever read this Court's decision in *Kyles* v. *Whitley*, which reversed a capital murder conviction because of *his own office's failure* to comply with *Brady*—by the very same prosecutor who took a leading role in Thompson's prosecutions. And, following *Kyles*, he changed nothing whatsoever in his office practice.

The office handbook, which allegedly "codified" office practice at the time of Thompson's trials, contained only four sentences on *Brady*—and they were manifestly incorrect. Indeed, as the office's own designee conceded, under the standards in that handbook a prosecutor would not have known to produce the blood evidence in this case or the many other pieces of evidence that should have been produced under *Brady*.

Connick also admitted facts demonstrating his awareness of the obvious need for training. He conceded that he had established a presumption against his assistants producing to the defense police reports,

witness statements, and other investigative materials, unless the assistants recognized that they were "required" to be produced under law, thus making it even more crucial for his assistants to understand what was "required."

And, pursuant to their faulty understanding of *Brady*, four separate prosecutors failed to turn over the blood evidence, which indisputably came from the perpetrator of the armed robbery. The jury heard that Connick and several of his assistants believed that, even when they knew the perpetrator's blood type was "B," they had no obligation to hand over the blood evidence, so long as they remained ignorant of Thompson's blood type. And so they "deliberately" avoided making any reference to the blood evidence at trial. These same prosecutors also failed to produce significant favorable evidence in the murder trial, that when ultimately presented to the jury in 2003, resulted in Thompson's swift acquittal.

In the face of the overwhelming evidence of indifference that was before the jury, Connick urges the Court to disregard it all, and instead to overrule longstanding precedent and create a blanket rule that would insulate district attorneys from any liability for misconduct unless a preexisting pattern of constitutional violations is proven.

The Court should decline Connick's unwarranted invitation. There is nothing in the text of §1983 or this Court's precedents to support any such absolute and categorical treatment of district attorneys as

opposed to other municipal policymakers. Nor does it make sense as a matter of logic that the only way to prove the deliberate indifference of a municipal policymaker—whether a district attorney or otherwise—is through evidence of a pattern of violations.

Under *Monell*, *Canton*, and *Bryan County*, proof of a pattern is one way to prove a policymaker's awareness, which in turn is needed to prove deliberate indifference. But it is one of at least three ways to do so. In addition to proof of a pattern, a plaintiff may also present (1) direct evidence of both awareness and deliberate indifference by the policymaker, or (2) proof that the risk of constitutional violation is so "obvious" that the policymaker can be deemed aware of it.

In the instant case, Thompson introduced extensive direct evidence of Connick's awareness and indifference, which is alone sufficient for liability. And he offered evidence that the risk of *Brady* violations without proper training was obvious, and the consequences potentially grave—up to and including executing an innocent man—such that Connick could be deemed fully aware. And, for full measure, Thompson demonstrated a course of conduct consisting of multiple *Brady* violations, by four prosecutors, for many months, across two criminal trials.

The exacting standard for failure-to-train liability articulated over 20 years ago in *Canton* (and faithfully applied by the lower courts ever since) strikes the right balance between properly holding

public officials accountable for their own misdeeds and impermissibly subjecting them to liability solely for the misdeeds of their employees. In the instant case, the jury heard extensive evidence of deliberate indifference and the jury's verdict should stand. If the extraordinary facts of this case do not satisfy that exacting standard, it is difficult to imagine any that ever would.[3]

ARGUMENT

I. CONNICK WAS DELIBERATELY INDIFFERENT.

More than 20 years ago, the Court recognized that liability may be imposed on a local government entity, such as a district attorney's office, for failing to train its employees so as to avoid violating the constitutional rights of citizens they serve. *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). To assure that government entities are held accountable for their own misdeeds, and not merely those of their employees, the standard for liability is exacting. It requires a plaintiff to prove: (1) a failure to provide adequate training; (2) a causal connection between that failure and the constitutional violation suffered by the plaintiff; and (3) deliberate indifference to the

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[3] Indeed, particularly when viewed through the governing standard of review, the record does not support the "single incident" premise upon which petitioners sought certiorari, warranting dismissal of the writ.

plaintiff's constitutional rights. *Ibid.* Only where there is solid proof of deliberate indifference can that standard be satisfied. This is such a case.

A. A Pattern Of Violations Is Not Always Required To Prove Deliberate Indifference.

Connick and his *amici* urge the Court to adopt a blanket rule that district attorneys can *never* be liable under §1983 unless there was a prior pattern of violations. This *per se* rule may have the virtue of simplicity, but it has no foundation in the statutory language or this Court's precedents. Indeed, to adopt Connick's proffered rule would represent a dangerous step backwards and would require overruling both *Canton* and *Monell*.

Under *Canton* and *Monell*, the touchstone is awareness. If the policymaker is aware of the need for training and the likelihood of constitutional injury, and he or she fails to provide the required training, liability attaches. There are at least three ways to satisfy the deliberate-indifference standard: (1) through direct evidence of actual indifference to a known need to train; and (2) through circumstantial evidence establishing either (a) a situation where the need to train is so obvious that knowledge can fairly be imputed to the decisionmaker, or (b) a pattern of prior violations, such that the decisionmaker can be deemed on notice of the need to train to avoid them going forward.

In *Monell* v. *Department of Social Services of New York*, this Court held that "municipalities and other local government units" are "included among those persons to whom §1983 applies." 436 U.S. 658, 690 (1978). Under *Monell*, liability attaches "when execution of a government's policy or custom * * * inflicts the [constitutional] injury." *Id.* at 694. The *Monell* Court did not limit §1983 to cases where an explicit policy violates the Constitution. Instead, the Court noted that it had not defined "what the full contours of municipal liability under §1983 may be" and left "further development of [§1983] action[s] to another day." *Id.* at 695.

Eleven years later, the Court decided *City of Canton* v. *Harris*. *Canton* concerned the circumstances under which inadequacy of training can form the basis of municipal liability under *Monell*. The plaintiff in *Canton* alleged that the city was liable under §1983 because inadequately trained police officers ignored her medical condition after her arrest. The Court noted that although the courts of appeals uniformly agreed that a §1983 claim could be based on a municipality's failure to train, there was a "substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted." 436 U.S. at 388 (emphasis in original).

In addressing that issue, the Court explained that liability could be predicated upon "deliberate indifference," which in this context means inaction in

the face of reasonably known or objectively identifiable conditions:

> But it may happen that in light of the duties assigned to specific officers or employees *the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (emphasis added). Thus, in determining whether local officials have been deliberately indifferent to constitutional rights, the focus is on (1) the obviousness or actual knowledge of the need for training, and (2) the likelihood that a failure to train will result in constitutional violations.

To illuminate those requirements, the Court offered two non-exclusive hypothetical situations in which the requisite "level of fault" for failure-to-train liability could be satisfied. First, the Court recognized that the need to train in certain circumstances "can be said to be 'so obvious' that a failure to [train] could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton*, 489 U.S. at 390 n.10. The Court did not characterize this form of proof as an "exception" to any general rule requiring proof of a pattern of violations. Rather, it was the *first*

example the Court offered in explaining the deliberate indifference standard.

The Court also envisioned another basis for failure-to-train liability: "It could *also* be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Ibid.* (emphasis added). Again, whether "single-incident" or "pattern," the touchstone is awareness of the need—demonstrated in the Court's second hypothetical by a pattern of violations, and in the first by the obvious need for training itself.

In providing those examples of circumstantial proof, the Court did not purport to limit its analysis to claims against police departments. Nor did it announce a preference for one way of proving deliberate indifference over the other. Most important, the Court did not foreclose other ways of establishing the "level of fault"—such as by direct evidence of the policymaker's actual knowledge of the need for training or disregard for the constitutional obligation itself.

The Court made clear that the need for public officials to train their employees on avoiding constitutional violations may be so obvious in some situations that the failure to do so gives rise to §1983 liability and that a pattern of violations is unnecessary. The Court anticipated that training police officers in the proper use of deadly force might be one case in which the need to train was so obvious that a pattern would

not be necessary to prove deliberate indifference. In other instances, the need for training may not be so obvious—in which case, a pattern of violations could supply the requisite notice before a policymaker could properly be deemed "deliberately indifferent" to that need. Accordingly, although the plaintiff had not offered proof of a pattern at trial, the Court remanded to give the plaintiff "an opportunity to prove her case under the 'deliberate indifference' rule we have adopted." *Id.* at 392.

In *Board of County Commissioners of Bryan County* v. *Brown*, the Court contrasted the failure-to-train cases envisioned in *Canton*—where there is proof of an ongoing and deficient or non-existent training program—with so-called "single-incident" cases involving a failure to properly *screen* a *particular* candidate for employment. 520 U.S. 397, 407-10 (1997). In *Bryan County*, the plaintiff claimed that in deciding to hire a particular deputy, the county sheriff's office inadequately screened that specific candidate, who later violated the plaintiff's constitutional rights. The Court reaffirmed its earlier recognition of "the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Id.* at 409 (citing *Canton*, 489 U.S. at 390 & n.10).

Against this background, the Court rejected plaintiff's attempt to analogize her improper screening-and-hiring claim to the failure-to-train claims described in *Canton*. *Ibid.* The Court went on to explain why pattern evidence is not required in all failure-to-train claims:

> The likelihood that the situation will recur *and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights* could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the *obvious consequence* of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The *high degree of predictability may also support an inference of causation*—that the municipality's indifference led directly to the very consequence that was so predictable.

Id. at 409-10 (emphases added). The Court observed that, unlike failure-to-train claims, inadequate screening claims present a "particular danger" that "a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself." *Id.* at 410. That is because "predicting the consequence of a *single hiring decision*, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." *Ibid.* (emphasis added).

In failure-to-train cases, a pattern is not required in all instances because "the risk from a particular glaring omission in a training regimen" can be "'obvious' in the abstract." *Ibid.*; see also *Simpson* v. *Univ. of Colo.*, 500 F.3d 1170, 1178 (10th Cir. 2007) ("In applying this standard we take note of *Canton*'s discussion of what is meant by an 'obvious' need for training. It recognized that a need could be 'obvious' for reasons other than knowledge of previous incidents within the municipality.").

The concepts of "obviousness" and breadth of impact supply the key distinctions between the failure-to-train claims the Court envisioned with approval in *Canton* and the inadequate screening claims the Court rejected in *Bryan County*. In failure-to-train claims, a non-existent or glaringly inadequate training program can rightly be said to be a municipal policy, the deficiency of which can be objectively obvious and the impact of which can be far-reaching, regardless of whether previous violations are shown. In such cases, the actions that form the basis for municipal culpability are not a "single incident." It is an ongoing and either non-existent or grossly deficient training program that has the potential to affect an entire category of municipal employees and harm countless citizens. See *Canton*, 489 U.S. at 390 & n.10; see also *Woodward* v. *Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 929 (7th Cir. 2004) (evidence of a single injury caused by a failure to train was evidence that the government actor "was fortunate, not that it wasn't deliberately indifferent").

By contrast, a single-incident screening-and-hiring claim is disfavored because it premises culpability on an isolated act by a municipal policymaker, whose impact is limited to the actions of the specific hired employee, rather than on an ongoing municipal program potentially impacting many employees.

Because failure-to-train claims present difficult questions of fault and causation, the lower courts have rightly subjected them to the searching review required by this Court. As Connick's own *amici* correctly observe, the "exacting standard" the Court established in *Canton* "for finding liability under a failure to train theory where there is no pattern of previous constitutional violations" has been "repeatedly reaffirmed by the federal courts." Br. of *Amicus Curiae* Orleans Parish Assistant District Attorneys 5.

Under that "well-established analytical framework" (*ibid.*), a pattern of similar violations is not the only way to prove deliberate indifference—as every court of appeals to have addressed the issue has held.[4] But like virtually all standards based on "state

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[4] *Young* v. *City of Providence*, 404 F.3d 4 (1st Cir. 2005); *Walker* v. *City of New York*, 974 F.2d 293 (2d Cir. 1992); *Berg* v. *Cnty. of Allegheny*, 219 F.3d 261 (3d Cir. 2000); *Buffington* v. *Baltimore Cnty.*, 913 F.2d 113 (4th Cir. 1990); *Cousin* v. *Small*, 325 F.3d 627 (5th Cir. 2003); *Plinton* v. *Cnty. of Summit*, 540 F.3d 459 (6th Cir. 2008); *Woodward* v. *Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004); *Larkin* v. *St. Louis Hous. Auth. Dev. Corp.*, 355 F.3d 1114 (8th Cir. 2004); *Tanner* v. *Heise*, 879 F.2d 572 (9th Cir. 1989); *Simpson* v. *Univ. of Colo.*, 500 F.3d 1170 (10th

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of mind," deliberate indifference may be proven by either direct evidence of indifference or circumstantial evidence where the need for training is "obvious" and constitutional injury is the "'highly predictable' consequence" of failing to provide it. *Bryan County*, 520 U.S. at 409. This Court has never limited plaintiffs to proving fault in the unduly restrictive manner urged by Connick.

Connick relies heavily upon Justice O'Connor's separate opinion in *Canton*. See, *e.g.*, Pet. Br. 41, 60-61. If anything, Justice O'Connor's opinion supports liability here. Justice O'Connor agreed that where, as here, "a §1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission [in training] is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part). According to Justice O'Connor, "it could be shown that the need for training was obvious in one of two ways," including where, as here, the municipality "fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Ibid.* The "use of deadly force by police officers present[s] one such situation" because the "constitutional

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Cir. 2007); *Young* v. *City of Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995); *Daskalea* v. *Dist. of Columbia*, 227 F.3d 433 (D.C. Cir. 2000).

duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." *Ibid.*

The claim in *Canton*—"that police officers were inadequately trained in diagnosing the symptoms of emotional illness"—fell "far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city." *Id.* at 396-97. Unlike *Brady* obligations, the Court had not yet addressed the precise nature of the due process obligations of police in the *Bryan County* situation, and the "diagnosis of mental illness" was not a "usual and recurring situation[]" with which subordinate officials must deal. *Ibid.* Moreover, the plaintiff in *Canton* "presented no testimony * * * indicating that there had been past incidents of 'deliberate indifference' to the medical needs of emotionally disturbed detainees *or that any other circumstance had put the city on actual or constructive notice* of a need for additional training in this regard." *Id.* at 398-99 (emphasis added). Justice O'Connor thus expressly contemplated "other circumstances" in addition to a pattern that could put a policymaker on notice of the need for training.

B. This Case Presents Precisely The Circumstances Envisioned By This Court Where Failure-To-Train Liability Is Appropriate.

This case involves the type of failure-to-train claim approved in *Canton* and reaffirmed in *Bryan County*. Not only was the need for some *Brady* training obvious and not provided, but Connick as policymaker was manifestly indifferent to the constitutional obligation itself and also admitted facts establishing that he knew he needed to provide training on *Brady*'s requirements.

Connick's own direct testimony concerning his fundamental misunderstanding of *Brady*, and the demonstrably wrong office handbook concretely reveals Connick's indifference towards the constitutional obligation itself. Indeed, the sort of direct evidence of policymaker fault introduced in this case even more powerfully demonstrates deliberate indifference than the circumstantial inferences of knowledge and fault that may arise from a pattern.

This case is not really a "single incident" case at all. To be sure, it involves the violation of "only" one citizen's rights. But Connick's testimony and actions directly establish the fault of the policymaker, and there were numerous *Brady* violations by at least four prosecutors over a period of several months in the Thompson pretrial proceedings. Thus, the very premise upon which petitioners sought certiorari is flawed. This case fits even more comfortably within

the *Canton* failure-to-train framework than the hypothetical example provided by the Court in *Canton*—a single police officer who shoots a single suspect in a single incident with no direct evidence of policymaker indifference.

In this case, a culture of indifference suffused the office, and it came from the top. The district attorney read no law books and paid no attention to the constitutional standards. Prosecutors were told to produce only what was legally "required," and then were given no guidance about what was "required." And the instruction that Connick claims to have given, supposedly memorialized in the handbook, was demonstrably wrong.

The jury had ample evidence that four prosecutors knew about the blood evidence, and none produced it. This behavior was entirely consistent with the culture of the office, Connick's own testimony about what was required, and Connick's own handbook. And the non-produced evidence was not merely peripheral evidence that might have a tangential impact on the trial; it was evidence that could conclusively prove guilt or innocence.

The parties *stipulated* that the blood was from the perpetrator of the armed robbery. JA14-15. Had Thompson committed the crime, the blood would have been compelling evidence of his guilt. But the prosecutors had it tested, and then did nothing further with it. Indeed, Williams *deliberately* avoided mentioning the blood at trial. JA73, 80-81. Only two

inferences are reasonably possible: first, that the prosecutors suspected that Thompson was not the perpetrator, and were afraid the blood evidence would confirm it; or second, that the prosecutors simply did not care.

From the testimony of all witnesses, one sees a consistent picture—from Connick down, they believed that *Brady* was a narrow standard and that *Brady* violations were limited to the knowing and intentional concealment of evidence that is conclusively exculpatory on its face. This gross misunderstanding was not isolated, but rather manifested in the conduct of every prosecutor in this case.

1. Connick Actually Knew Training Was Required.

Connick—the sole policymaker for his office—admitted on cross-examination the requisite facts under *Canton* establishing his awareness of facts creating an obvious need for *Brady* training: (1) that his prosecutors regularly confronted decisions involving *Brady* (JA439); (2) that it was crucial for his prosecutors to make proper *Brady* decisions (*ibid.*); (3) that *Brady* was an "elastic thing" for which it was difficult to find a "standing definition" (JA151); (4) that *Brady* required his young and inexperienced prosecutors to understand *Brady*'s requirements (JA442); and (5) that if prosecutors made wrong *Brady* decisions, constitutional harm would result. JA439. Connick also acknowledged that his restrictive

discovery policy could lead to *Brady* violations and thus made it even more important for his assistants to understand their constitutional obligations. JA159.

Connick thus admitted each fact necessary to establish actual awareness of a training need as explained in *Canton*.

2. Despite His Actual Knowledge, Connick Provided No Training Or Correct Guidance.

The jury heard extensive evidence that, despite this awareness of the need for training, Connick nonetheless failed to provide any training or even any clear message regarding *Brady*. See, *supra*, pp. 16-18. None of the prosecutors involved in Thompson's cases identified any *Brady* training or instruction from anyone in the office, and the parties stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." JA27. The jury thus properly could conclude that despite Connick's actual awareness of the need for training, none actually was provided.

Connick makes extensive factual arguments about supposed generic training and guidance that allegedly was provided, but he ignores both the applicable standard of review and the record evidence

that there was absolutely no *Brady* training or guidance at the time of Thompson's prosecutions.[5]

Thus, although former first assistants McElroy and Bane claimed that the office provided *Brady* training, the jury was free to reject that testimony, given the conflicting contrary evidence. See *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 115 (1963) (cautioning that courts "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences and conclusions").

3. Even If The Jury Credited Petitioners' Accounts Of Supposed *Brady* Guidance, That Testimony Actually Supports An Independent Basis For Liability.

Even if the jury were to have credited testimony about supposed *Brady* guidance, the only evidence offered as to the *substance* of any such *Brady* guidance consisted of Connick's and McElroy's assertions that the *Brady* guidance at the time of Thompson's trials was codified in the 1987 office handbook. JA393 (office *Brady* practice "from the very beginning,

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[5] Indeed, most of the testimony referenced in Connick's brief concerns procedures and structures unrelated to *Brady*. The only testimony about the *substance* of *Brady* guidance was that it ultimately was codified in the objectively deficient handbook.

[*Brady* instruction] was codified in the policy manual as Article 5.2"); see also JA407-08, 448-50. That handbook included nothing other than an objectively wrong explanation of *Brady*'s requirements. *Supra*, at pp. 9-11.

The handbook included one sentence devoted to the substance of *Brady*'s requirements: "In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material—that is, information in the possession of the State which is exculpatory regarding the defendant." JA704. But *Brady* does not require either a request from defense counsel or an order from the court. *United States* v. *Agurs*, 427 U.S. 97, 107 (1976). And, contrary to the manual and Connick's testimony, *Brady* long has required production not just of "exculpatory" evidence, but of all information that is "favorable to the accused," such as impeachment information. *Giglio*, 405 U.S. at 154-55.

Even the official designee of Connick's office conceded that the handbook's *Brady* description was deficient (JA481-82), and that the handbook would not have alerted prosecutors that the blood report should have been produced. JA483-84. Thus, although the jury properly could have found this to have been a "no training" case, it also could have found this to have been a "completely wrong training case," and that the demonstrably wrong guidance later "codified" in the handbook was a substantial cause of Thompson's injuries. Far from supporting Connick's theory, a careful review of the proffered

testimony actually provides an independent basis for liability.

4. Thompson Established Connick's Actual Indifference To The Underlying Constitutional Obligation Itself.

This is not a case in which a jury was asked to find the indifference of the policymaker by extrapolating from a "single incident" of a single municipal employee. On the contrary, this case involved the rare circumstance where the policymaker's own testimony and actions demonstrated indifference toward the constitutional obligation itself.

Although Connick alone was responsible for all office policies, he admitted he "stopped reading law books" when he became district attorney. JA144. He erroneously and narrowly believed *Brady* extended only to "exculpatory evidence," which he described as "evidence that he's not guilty of the crime with which he [was] charged." JA147-48. And, in a remarkable statement totally at odds with the very foundation of *Brady*, Connick claimed that *Brady* and his office policy only precluded the "intentional" concealment of evidence, which he distinguished from "the inadvertent conduct of [an] assistant under pressure with a lot of case load * * * ." JA159. Connick's own testimony reflected such a fundamental misunderstanding of *Brady* that by that alone he

could be found to have been indifferent to the obligation.

Because Connick deliberately ignored this Court's *Brady* teachings, he provided objectively erroneous guidance in the 1987 handbook, which supposedly codified prior office guidance. Consistent with Connick's grossly flawed understanding of *Brady*, the handbook misstated *Brady*'s obligation to such an extreme extent that the jury could properly view it as also reflecting indifference.

Moreover, when this Court reversed the conviction obtained by his office in *Kyles*, Connick admitted he was unaware that *Kyles* even involved *Brady* issues even though both the underlying conduct and this Court's decision occurred while he was district attorney. JA152-53. As a result, it is not surprising that Connick also testified that he made no changes to enhance office policy as a result of this Court's decision. JA154.

Although *Monell* and *Canton* do not require a plaintiff to establish by direct evidence the actual indifference of the policymaker to the constitutional obligation itself, in the instant case there was ample evidence for the jury to conclude just that. Concerns about imposing *respondeat superior* liability are not present in this case, in part due to the rare but disturbing evidence from the policymaker himself.

C. Connick's Request For A Blanket Exemption Is Dangerous And Contrary To Precedent.

Ignoring both the Court's analysis in *Canton* and the direct evidence of deliberate indifference in this case, Connick seeks to impose a rigid and artificial rule that deliberate indifference can be established against a district attorney only through circumstantial proof of a history of assistant district attorneys injuring citizens through *Brady* violations. Connick's proposed rule is inconsistent with precedent, makes no sense as a matter of logic, and would effectively insulate district attorneys from any accountability.

In this case, the need for training was not only objectively obvious, but Thompson also offered *direct evidence*—mostly from Connick himself or based on Connick's own 1987 handbook—that Connick was both actually indifferent to the underlying constitutional obligation and actually aware of the need to provide training or guidance. Such direct evidence, although rare, is far more powerful than the circumstantial inferences that arise through proof of a pattern.

Encouraging government policymakers to take a proactive approach to safeguarding constitutional rights decreases both the instance of constitutional violations and the number of §1983 lawsuits. *Owen* v. *City of Independence*, 445 U.S. 622, 656 (1980); *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317-18 (2d Cir. 1999) ("A judgment against a municipality

not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue."). Connick's proposed restrictive rule would remove these important safeguards.

If, as Connick urges, *Monell* liability for failure to train is essentially a dead letter in the absence of a pattern of constitutional violations—no matter how obvious the need for training, no matter how clearly the policymaker actually perceived the need, no matter how easy it would be to provide, no matter how predictable the consequences, and no matter how grave the consequences—then essentially the only way a municipality can be held liable under *Monell* is if substantial numbers of citizens are injured first or explicit policies cause constitutional injury.[6]

Under Connick's proposed rule, a plaintiff who had not demonstrated a history of violations could not recover against a district attorney, even if he or she testified: "I know my assistants need training, and that they will violate the Constitution without training, but I don't know and really don't care what our constitutional obligations are. I'm not going to provide any training." Although that hypothetical might seem

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[6] The Fifth Circuit, for example, concluded in another case that 13 prior *Brady* violations did not constitute a pattern sufficient to put Connick on notice. See *Cousin*, 325 F.3d at 637.

unlikely, that is precisely what the jury could have found Connick to have thought and done in this case.

1. Connick Should Not Be Relieved Of Responsibility To Train His Employees Merely Because They Are Lawyers.

Connick and his *amici* argue that district attorneys should receive a special exemption from failure-to-train liability because their employees went to law school—and can be "presumed" to need no training as a matter of law. Pet. Br. 25-31. There are many problems with that argument.

Although law schools provide theoretical grounding in principles of law, many do not provide the substantive and practical grounding necessary for prosecutors to honor their constitutional obligations in the rough-and-tumble world of state criminal litigation. Cf. *United States* v. *Bagley*, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) (for *Brady* purposes, prosecutors "must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt"). It strains credulity that lawyers—who may or may not even have encountered *Brady* during a first-year criminal procedure class—would require no additional training to be able to understand how to go about fulfilling their *Brady* obligations as actual prosecutors.

Despite being under pressure to "get convictions" (JA190), the prosecutors in Connick's office were

given neither accurate, substantive guidance nor the kind of clear message about *Brady* compliance that could counteract that intense pressure. The jury heard testimony from Connick that *Brady* required prosecutors to make difficult choices, and heard other testimony that Connick compounded that difficulty by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements. Connick admitted that his selective-production policy made it even more crucial for his prosecutors to make proper *Brady* determinations. Connick's failure to deliver a clear message about the importance of *Brady* compliance or to provide accurate, substantive guidance is not excused merely because his prosecutors graduated from law school and passed the bar examination.

The idea that lawyers should be presumed to understand *Brady* also is refuted by Connick's own seriously inaccurate testimony about *Brady*, the facially incorrect articulation of *Brady* in the office handbook, and the mistaken assertions about fundamental *Brady* principles made by prosecutors Dubelier and Williams. If lawyers all can be presumed to understand *Brady*, none of those serious *Brady* misunderstandings would have been possible.

Particularly where a district attorney chooses a policy of turning over only what "state and federal law require" and "no more," it is incumbent upon him to provide a clear message about the critical importance of *Brady*. He must also provide some correct, substantive guidance about what they must do to

determine whether or not they have *Brady* material. The jury heard ample evidence that Connick's office did none of that. In fact, what Connick claims to have told his prosecutors in the guidance ostensibly codified in the handbook was palpably wrong, and would have misled even those who encountered *Brady* in law school.

Connick and his *amici* argue that training would not have made a difference in this case because it would have been "obvious" that *Brady* required production of the evidence here. Pet. Br. 54-60. But both the office's designated witness and Connick himself *disputed* the constitutional obligation to produce the blood report if prosecutors did not know Thompson's blood type. JA487, 550-51. And the office's designated witness admitted that the handbook would not have required the production of the evidence either. JA483-84.

In the end, Connick's argument misunderstands the examples provided by this Court in *Canton*. Connick argues there is a difference between the need for training of police officers on the use of deadly force as discussed with approval in *Canton*, and the need for training of prosecutors as to *Brady*, because the latter are "professionals." See, *e.g.*, Pet. Br. 40. But if anything, *Canton*'s hypothetical of a single incident of force by a single police officer in the heat of the moment comes much closer to the line of *respondeat superior* than this case. Even so, the Court indicated with approval in *Canton* (and later re-affirmed in

Bryan County) that liability could properly attach to a municipality in such a situation.

Here, there was no such "heat of the moment," but a course of conduct over two criminal trials involving multiple prosecutors and numerous nondisclosures. Prosecutors had months to decide what to do with the blood samples and police reports and days to produce the crime-laboratory report. And, by any measure, the consequences of Connick's deliberately indifferent failure to train in this case—the unjust imprisonment and near-execution of an innocent man—are no less perilous than police use of deadly force in the *Canton* hypothetical.

2. Holding Connick Accountable For Failing To Train His Prosecutors Is Consistent With Prosecutorial Immunity.

Contrary to the assertions of Connick and his *amici*, holding a district attorney's office accountable under *Monell* for a deliberately indifferent failure to train prosecutors to avoid violating citizens' constitutional rights is fully consistent with the absolute immunity accorded individual prosecutors. This Court has long held that municipalities cannot claim the same immunities that shield individuals from damages liability under §1983. See *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) (citing *Owen* and *Monell* and stating that these decisions "make it quite

clear that, unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under §1983"). The Court's recent decision in *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009), did not alter that longstanding rule. The only claims before the Court in *Goldstein* involved the personal liability of individual prosecutors. *Id.* at 858-59. The Court was not presented with municipal liability claims under *Monell*.

Claims against municipal policymakers in no way undermine the rationale for affording immunity to individual prosecutors addressed in *Goldstein*. The "basic fear" underlying prosecutorial immunity is "that the threat of damages liability would affect the way in which individual prosecutors carried out their basic court-related tasks." *Goldstein*, 129 S. Ct. at 862. But that rationale loses force when the liability of the municipality, not the individual, is at issue. As the Court has explained in the analogous context of qualified immunity:

> [C]onsideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Owen, 445 U.S. at 656 (original emphasis omitted). The argument that *Goldstein* should be extended to

foreclose Thompson's claim would effectively overrule *Monell, Canton*, and *Bryan County*. It would also improperly expand absolute prosecutorial immunity far beyond the bounds set by the Court. And, it would ignore the distinctions between municipal and personal liability recognized in *Leatherman* and *Owen*.

That conclusion is confirmed by an *amicus* brief filed on behalf of 49 States (including Louisiana) and the District of Columbia in *Goldstein*, arguing against expanding individual liability to include supervisory attorneys precisely *because* of the availability of municipal liability under the very theory of liability in this case: "[I]f a supervisory prosecutor is a 'final policymaker' for a county or city, the municipal entity itself may be liable for the prosecutor's actions, making supervisory liability duplicative and unnecessarily expansive." Brief for the States of Kansas, et al., as *Amici Curiae* in Support of Petitioners 21. "Though municipalities cannot be held liable on a *respondeat superior* basis," the States explained, "they can be liable when an 'official policy or custom' causes a constitutional deprivation." *Ibid.* Where, as here, "a supervisory prosecutor is a 'final policymaker' for a municipality, then that official's decisions may create policy that results in constitutional harm for which the municipality is liable under Section 1983." (Internal citation omitted.) And, the States observed, "[s]uch a 'policy' may include the 'failure to train or supervise' municipal employees." *Ibid.* (citing *Canton*). Because, in the States' view, "a municipality itself may sometimes be subject to the remedies of

Section 1983," the Court did not need to "expand" the statute to "include individual supervisory prosecutors." *Ibid.* It necessarily follows that the Court need not, and should not, narrow the statute here to exclude municipal liability when district attorneys act as policymakers.

Holding a district attorney accountable for being deliberately indifferent to constitutional rights in failing to train his prosecutors is fully consistent with *Goldstein*. For one thing, supervisory liability is not necessary under *Goldstein* precisely because *Monell* liability *is* available in narrow cases like this one. For another, both share the same goal of protecting individual prosecutors—one by ensuring they can perform their jobs without undue fear of liability, and the other by ensuring they have the tools they need to perform their jobs without violating the rights of the citizens they serve.

D. This Court's Exacting Standard For Proving Failure-To-Train Claims Allows Municipal Liability Only In Rare Cases.

Although Connick and his *amici* claim that allowing the verdict to stand would open the floodgates to liability, they have pointed to no evidence that in the 20 years since the Court first recognized the prospect of municipal liability for failure to train, either municipalities in general—or district attorney's offices in particular—have faced a torrent of liability for such claims. If anything, the available evidence confirms that the existing legal framework—

including the exacting standard for pleading and proving failure-to-train claims against municipalities—strikes the proper balance between holding public officials accountable for violating citizens' constitutional rights, on the one hand, and protecting the public fisc on the other. Twenty years of actual experience with *Canton* underscores that Connick's proposed new rule is not only unwise, but also unnecessary.

Connick suggests that holding the district attorney's office liable for failing to provide any training concerning *Brady* would subject district attorney's offices to claims for routine decisions on search and seizure, interrogations, and sentencing. Pet. Br. 35. That concern is misplaced. Some of those prosecutorial decisions—concerning, for example, the use of other-crimes evidence and expert witnesses—hardly ever implicate constitutional rights. Others—such as those concerning search and seizure—are not prosecutorial in nature at all, as they typically involve investigative processes and fall on the police side of the line. As for the rest, the potential consequences of any failure to train—which the Court's hypothetical in *Canton* necessarily implies should be a key factor in the deliberate-indifference analysis—are significantly less harmful. And in all of the examples cited by petitioners, the prosecutor's decisions are subject to court review *before* the evidence can be used at trial.

The nature of a prosecutor's *Brady* decision, however, is materially—perhaps uniquely—different.

In most instances, a *Brady* decision is in the private hands of the prosecutor alone, and there may be no judicial review except in the rare instance where a judge orders *in camera* inspection of the entire State file, or, as here, by fortuitous circumstances. Review of a prosecutor's *Brady* determinations almost always occurs post-trial, after the accused has already been deprived of his liberty—and even then usually only in the most significant of crimes and if the defendant somehow gains access to some or all of the State's file.

Unlike *Miranda* protections, search and seizure restrictions, and the many other constitutional rights implicated in a criminal trial, *Brady* claims concern the central question of guilt and innocence. Indeed, while in the other examples evidence of guilt may be excluded as a constitutional remedy, *Brady* violations deprive a citizen of evidence that may help establish innocence. Here, because prosecutors failed to turn over the blood evidence and other documents favorable to Thompson, the wrong man was convicted and nearly executed. *Brady* violations, predictably, undermine the integrity of a trial and increase the chances that an innocent man will be punished or even executed—making *Brady* the prosecutorial equivalent of the police use of deadly force cited by the *Canton* Court as the *exemplar* of failure-to-train liability.

II. CONNICK'S DELIBERATE INDIFFERENCE CAUSED PROSECUTORS TO VIOLATE THOMPSON'S CONSTITUTIONAL RIGHTS.

A §1983 claimant must prove that the policymaker's deliberate indifference was a substantial cause or "moving force" of the constitutional violation. *Bryan County*, 520 U.S. at 404. Although courts have phrased the causation requirement in various ways, the Court described the key question in *Canton* as: "[w]ould the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *Canton*, 489 U.S. at 391. The jury in this case had ample evidence from which to answer that question in the affirmative. See *Gallick*, 372 U.S. at 115 (jury entitled to weigh evidence and draw inferences).

Connick admitted that he knew that his prosecutors would be confronted with difficult *Brady* decisions and that it would be important for his prosecutors to understand and follow *Brady* to avoid violating citizens' constitutional rights. Yet none of the *Thompson* prosecutors who worked under Connick at the time could recall any training involving *Brady*.

As a result of the complete lack of training and the flawed guidance that Connick claimed to have memorialized in the handbook, it is not surprising that the prosecutors involved in Thompson's criminal trials were fundamentally wrong when they were asked to explain *Brady*'s requirements. For example, until the district judge literally reared back in surprise at trial, Williams claimed that *Brady* did not

require production of impeachment material. JA217. Dubelier said that *Brady* did not require the production of police reports describing the murder perpetrator as having "close-cut hair" (JA140-43), even though he had a contemporaneous mug shot of Thompson with a large "Afro" style haircut (JA575), as long as Dubelier could conjure up in his own mind some explanation of how the two could be reconciled. JA142. This type of confusion and misunderstanding about *Brady* was fully consistent with Connick's own misunderstanding.

As a result of broad misconceptions about *Brady*'s requirements, at least four prosecutors—Dubelier, Williams, Whittaker, and Deegan—knew about the blood evidence and yet failed to disclose it. When Dubelier responded to Thompson's discovery request in the armed-robbery case, he had documents from the police investigation noting that a bloody swatch was cut from the pant leg of Jay LaGarde; yet, he took no steps to produce the evidence. JA279-80. The jury was free to conclude that Dubelier, the special prosecutor in charge of both cases, knew but chose not to reveal there was blood evidence. Indeed, Williams admitted that if there were a decision by the prosecutors not to use the blood evidence, it must have been made by Dubelier. JA83-84.

The evidence was even more compelling as to Williams's and Whittaker's knowledge of the blood evidence. The crime-laboratory report was addressed to Whittaker, who admitted receiving it and putting it on Williams's desk just two days before the armed-robbery trial. JA179. Williams conceded that he knew

about the blood evidence, and that he *deliberately* stayed away from talking about blood in his questioning of witnesses and argument at the armed-robbery trial. JA80-81. Indeed, after the robbery victim asked Williams about the blood evidence, Williams responded by saying it was "inconclusive." Whether Williams actually lied to Jay LaGarde or somehow justified his statement because he may have chosen not to ascertain Thompson's blood type, Williams's assertion that the results were "inconclusive" puts to rest any claim that he was unaware of those results.

Connick insists that "[n]othing [his] office did could have conceivably caused" the "evil act" of a "prosecutor—perhaps acting with others, perhaps acting alone—knowingly bury[ing] evidence that would have cleared Thompson." Pet. Br. 60. Connick's attempt to re-argue the facts suffers from several basic flaws.

First, although Connick points to Michael Riehlmann's account of Deegan's statement to support this argument, the jury was free to reject that account in its entirety. More importantly, Riehlmann was hardly clear about what Deegan allegedly told him years before the civil trial. JA362-63, 367. Indeed, Riehlmann testified that "Gerry told me that he had failed to turn over stuff *that might have been* exculpatory." JA363 (emphasis added). Moreover, Riehlmann conceded that he could not say whether or not Williams, Dubelier, or other prosecutors were

involved in the non-production of the evidence. JA362, 369-70.

There are any number of reasonable inferences that could be drawn from Riehlmann's testimony about Deegan's thinking at the time of his alleged statement, if the testimony is to be credited at all. For example, Deegan could have had misgivings about not producing the report, even if he had been instructed by other prosecutors or otherwise believed they were not "required" to produce it unless they knew Thompson's blood type.

Second, although Connick has repeatedly argued in this civil litigation that the crime-laboratory report "obviously" was *Brady* material, the district attorney's own designated witness testified on behalf of the office that *Brady* did *not* require the production of the crime-laboratory report unless the prosecutors knew Thompson's blood type. JA487. And, as Glas testified, Connick and McElroy both held similar views at various times. JA550-51.

Third, the district attorney's designated witness testified that if the prosecutors had been following the guidance supposedly codified in the 1987 office handbook, they would not have known to produce the crime-laboratory report. JA483-84. Indeed, a jury could have predicated a finding of causation *on those facts alone*. If the jury credited Connick's and McElroy's claims that the handbook "codified" egregiously incorrect prior *Brady* guidance that would not have required production of the crime-laboratory report or

other withheld evidence, it could have found that the constitutional injury in this case occurred *because* the assistants simply followed that erroneous guidance.

Fourth, the evidence shows that multiple prosecutors failed to meet their *Brady* obligations by not only failing to produce the blood evidence, but also by failing to produce other items of *Brady* material. The sheer number of violators and violations strongly suggests causation. Two of those prosecutors—lead prosecutors Williams and Dubelier—were among the highest-ranking members of the office. Dubelier was the number three person in the office, and Williams was a senior homicide prosecutor. Dubelier and Williams had witness statements and police reports indicating that only one perpetrator was involved in the murder (conflicting with Freeman's trial testimony that both he and Thompson were at the crime scene); they had a description of Liuzza's murderer that was both inconsistent with Thompson's appearance (as reflected by a contemporary photograph of Thompson in the State's possession), and fully consistent with Freeman's appearance; they had statements showing that Freeman had told conflicting stories about what occurred on the night of the Liuzza murder; and they had impeachment evidence about another State witness's effort to collect a reward.

The jury was certainly free to determine causation from the number of actors, the number of violations, and the actors' total confusion about the *Brady* standard. It was also free to conclude that what

occurred here was not an "isolated incident" by one rogue employee. Deegan was far and away the most junior person on the Thompson prosecution team. As grand-jury prosecutor Glas testified, it was "ridiculous" to believe that Deegan took action on his own. JA536. The jury properly rejected the dubious notion that the most junior person on the prosecution team made a unilateral decision not to produce critical evidence in a high-profile prosecution.

Fifth, Connick's position is squarely at odds with the recognition that a failure to train can be a moving force behind constitutional injury, even if "the proper course is clear" in any particular case, because prosecutors may have "powerful incentives to make the wrong choice." See *Walker,* 974 F.2d at 297. The purpose of training is not just to instruct, but also to send a clear message about the priorities of the municipal agency. Unfortunately, although it would have been easy to do so, that message was never delivered in Connick's office at the time of Thompson's prosecutions.

In the end, Connick's theory that there was only one *Brady* violation by one prosecutor fails to account for the actual evidence or the standard of review. Not only does it ignore that no fewer than four prosecutors were involved in the non-production of the blood evidence, but it also fails to account for the stipulated facts that police reports and other evidence were not turned over by Dubelier and Williams in the murder prosecution, with which Deegan was not involved. That extensive evidence rebuts Connick's

rather remarkable assertion that Thompson produced *no* evidence that "a specific, systemic flaw in Connick's approach to *Brady* compliance actually caused the violation in this case." See Pet. Br. 60.

Connick's attempts to minimize the numerous *Brady* violations rest not on the evidence, but rather on mischaracterizations of it. Connick contends that "these alleged nondisclosures have never been adjudicated *Brady* violations to begin with." Pet. Br. 49. But the state appellate court that reversed Thompson's murder conviction stated that it had no need to make any such findings because it held that the abridgement of Thompson's right to testify in his own defense in the murder trial—which was caused by the non-production of blood evidence and invalid robbery conviction—was structural error requiring reversal of the murder conviction. *State* v. *Thompson*, 825 So. 2d 552, 557 (2002). Connick's argument also disregards that the federal habeas courts which reviewed Thompson's convictions never saw the totality of the withheld evidence. See *Kyles*, 514 U.S. at 437-38 (cumulative effect of all non-produced evidence is to be considered rather than each item individually).

Although Connick also attempts to defeat causation by arguing that the "office policy was to disclose all scientific reports * * * " (Pet. Br. at 7, 58-59), the jury was free to reject the convenient notion that this was the *one* exception to Connick's presumption against nondisclosure. Not only did Glas's account of Connick's statements refute such a notion (JA550-51), but the 1987 office handbook included no such policy,

referring instead only to the discovery articles of the Louisiana Code of Civil Procedure. In turn, the Louisiana Code of Criminal Procedure only required production of scientific test reports that are "intended for use at trial" or "exculpatory," with the latter standard raising many of the same failure-to-train issues. LA. CODE CRIM. PROC. ANN. art. 719A (1977).

III. REVERSAL UNDER THE DISTURBING FACTS OF THIS CASE WOULD UNDERMINE THE INTEGRITY OF THE JUSTICE SYSTEM AND PUBLIC CONFIDENCE IN THE RULE OF LAW.

Connick seeks to overturn a jury verdict arising from Thompson's 18 years of wrongful imprisonment—14 of them on death row—and multiple near-executions for a murder and robbery he did not commit. Those prosecutions were marked by repeated *Brady* violations by multiple prosecutors, broad misunderstanding of *Brady*'s requirements, and total indifference by the policymaker. As demonstrated above, the judgment below is faithful to this Court's precedent. It poses no danger of unleashing a torrent of similar claims. And it is respectful of the rule of law.

In our system of justice, great deference is accorded to prosecutors—and properly so. Absolute immunity shields prosecutors in carrying out their duties so that fear of personal liability will not inhibit the performance of their critical role in maintaining

law and order. When the constitutional rights of individuals are violated by prosecutorial misconduct, redress is generally available only through the narrow window of a suit against a government policymaker acting in his official capacity. Even then, only the most extreme cases can satisfy the stringent requirements for liability. Nothing less than proof of the policymaker's deliberate indifference to constitutional rights will suffice.

When such deliberate indifference by government officials comes to light—as it did in this case—public confidence in the integrity of the justice system is shaken. Congress has determined that, under appropriate circumstances, civil damage actions seeking redress for constitutional injuries caused by government misconduct have an important role in reinforcing the bedrock principle that we are a nation of laws, not men. The jury's verdict in this case to compensate Thompson for the deprivation of his liberty vindicates that principle, reinforces the rule of law, and restores public confidence in the criminal justice system.[7]

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[7] Connick's *amici* express concern about the potential impact of the $14 million judgment on the current district attorney's office (and others). Those concerns gloss over Connick's disregard for the law in yet another respect—his failure, contrary to the requirements of Louisiana law (LA. REV. STAT. ANN. § 42:1441.2.B (1995)), to carry liability insurance for his office—a failure the Fifth Circuit characterized in another case as "remarkabl[e]." *Hudson* v. *City of New Orleans*, 174 F.3d 677, n.12 (5th Cir. 1999). When Connick and his first assistant were

(Continued on following page)

Thompson was wrongfully imprisoned for eighteen years, fourteen of which were spent on death row. During those fourteen years, Thompson lived in solitary confinement for 23 hours a day, seven days a week, in a six-by-nine foot cell. When Thompson was sent to prison in 1985, his sons, John Jr. and Dedrick, were four and six years old. When Thompson was released, his sons were men of 22 and 24 years of age. Thompson testified that the wrongful convictions hit him "hard" because he realized he "wasn't going to be there for my children." Thompson also testified that in prison he wasn't able to be the kind of father he wanted to be for his sons because he "wasn't able to participate in the things a father and son [are] supposed to participate in." During this time, he received eight separate writs of execution and came within weeks of execution before the crime-laboratory report was unearthed.

Thompson's final execution date was set for the day before John Jr.'s high-school graduation. Thompson testified he asked his attorneys to try to move the execution date because he "didn't want to take a happy moment in my son's life and give him something to remember the rest of his life, that his father was executed the day before he graduated." When Thompson's attorneys informed him it was unlikely they could move the date, he asked them to attend his

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deposed six years later in this case, they continued to profess not to be aware of the statute, even in the face of the Fifth Circuit's opinion from just a few years before.

son's graduation, because "John was a smart little boy so I wanted, I was hoping that I could convince one of y'all to help him to go through college or get him into college. I just asked y'all to be there for him for me." Shortly afterward, the blood evidence was discovered and Thompson's execution was stayed.

Any suggestion by Connick's *amici* that a $14 million jury award for Thompson's eighteen years of wrongful imprisonment, fourteen of which were on death row, is somehow "unfair" rings hollow.

Throughout the months of pre-trial and trial proceedings against Thompson, there was a course of conduct that showed a pervasive disregard for *Brady* by multiple prosecutors. And there was ample evidence of both the district attorney's indifference to *Brady* and his wholesale failure to train, supervise, or monitor his prosecutors on what *Brady* requires. As a result, John Thompson was deprived of his liberty for 18 years and nearly executed by the State of Louisiana for crimes he did not commit.

The Reconstruction Congress intended §1983 to protect individuals such as John Thompson from just such wholesale disregard of their constitutional rights. See *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) ("[t]he very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights"). Providing categorical immunity to a municipality whose policymaker created a culture of indifference in his public office that nearly cost an innocent man his life

would have been intolerable to the Reconstruction Congress that enacted §1983.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Gerry Deegan, the prosecutor who harmed John Thompson, is now dead. No one knows why Deegan buried evidence that would have cleared Thompson and no one knows who conspired with him. Blue Br. at 11-13. Deegan's former employer, the Orleans Parish District Attorney's Office, now stands liable for Thompson's injury, on the theory it should have trained prosecutors to disclose the kind of evidence Deegan buried. *See City of Canton v. Harris*, 489 U.S. 378 (1989). Once this case went to the jury on such a theory, the result was foreordained: Thompson was awarded millions for the wrong he suffered at Deegan's hands. Yet that verdict nullifies a basic principle of municipal liability and must be overturned.

Municipal liability may never be premised on employee fault. *See Bd. of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997) (stating "[w]e have consistently refused to hold municipalities liable under a theory of *respondeat superior*"). To avoid vicarious liability, a failure-to-train claim must ordinarily be proved by a history of employee misconduct. A single incident suffices only "in a narrow range of circumstances." *Id.* at 409-10. Those circumstances are not present here.

Classroom-style instruction of prosecutors may be an effective component of the many approaches to *Brady* compliance open to district attorneys. But not having such formal training does not prove a district attorney "deliberately indifferent" to constitutional rights. *Canton*, 489 U.S., at 389. Deliberate indifference can be shown only when a

district attorney is notified of a specific training deficiency by past incidents of prosecutor malfeasance. *Bryan Cty.*, 520 U.S., at 407-08.

Thus, the jury in this case should not have been allowed to rely on a single *Brady* violation to "substitute for the pattern of injuries ordinarily necessary to establish ... culpability and causation." *Id.* at 409. But it was. This error allowed the jury to nullify the office's "immunity from *respondeat superior* liability," *Oklahoma City v. Tuttle*, 471 U.S. 808, 830 (1985) (Brennan, J., concurring), and hold the office liable for Deegan's malfeasance alone. The Court should reverse.

ARGUMENT

Evidently aware that the single-incident theory cannot support the verdict, Thompson runs from the theory altogether. First, Thompson erroneously reframes the question presented as evidence sufficiency. *See infra* part I. Next, he dilutes the exceptional nature of single-incident liability. *See infra* part II. He then claims the jury could have based liability on other *Brady* violations—violations which the jury was never asked to find and which Thompson never proved. *See infra* part III. Thompson also invents new theories of *Canton* liability. *See infra* part IV. He then speculates about alternate and irrelevant theories of causation. *See infra* part V. Finally, he implausibly denies that expanding single-incident liability to prosecutor errors will subject district attorneys to ruinous consequences. *See infra* part VI.

I. THE ISSUE IS LAW, NOT FACTS.

Thompson begins by reframing the question as a matter of fact, not law. Red Br. at i. The issue, however, is not whether the jury had sufficient evidence to impose liability, but whether the jury was wrongly allowed to consider single-incident liability at all. If, as petitioners contend, the single-incident theory had no place here, the verdict must be overturned because "there is no way to know that the invalid claim ... was not the sole basis for the verdict." *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *see also Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (because the Court "h[e]ld erroneous one theory of liability upon which the general verdict may have rested ... it is unnecessary for us to explore the legality of the other theories").

This Court overturned a jury verdict in *Tuttle* on precisely that basis. In *Tuttle*, the jury was wrongly allowed to impose municipal liability for inadequate training based on one incident of excessive force. *See Tuttle*, 471 U.S., at 821 (plurality op.) (finding error because the instructions "allowed the jury to impose liability on the basis of ... a single incident without the benefit of the additional evidence"); *id.* at 830 (Brennan, J., concurring) (finding error because "[u]nder the instruction in question, the jury could have found the city liable solely because [the officer's] actions ... were so excessive and out of the ordinary"). The Court rejected respondent's argument that the verdict was nonetheless valid because the jury had

before it "independent evidence" of inadequate training beyond the incident itself. *Id.* at 821-22 (plurality op.); *id.* at 830 (Brennan, J., concurring). It was enough that the verdict could have been based on an impermissible training theory.

Tuttle controls here. The district court treated this case as a candidate for single-incident liability and instructed the jury accordingly. *See infra* part III.A; Blue Br. at 14-16, 33-34. The question presented, then, is legal and not factual: whether allowing the jury to impose single-incident liability contravened the Court's municipal liability cases.

II. SINGLE-INCIDENT LIABILITY APPLIES IN NARROW CIRCUMSTANCES NOT PRESENT HERE.

Thompson can force his case into the single-incident paradigm only by diluting the concept. Thus, he claims single-incident liability is not a rare exception to the pattern rule, but instead one of many ways to prove deliberate indifference. He also argues that failing to formally train prosecutors on *Brady* is just like *Canton*'s paradigm single-incident scenario, which involved a complete failure to train police officers on using deadly force. Red Br. at 29-38, 49-50. Thompson is wrong on both counts.

Thompson's denial that single-incident liability applies only in rare cases flatly contradicts *Bryan County*. There, the Court left no doubt that pattern liability is the norm:

> If a [training] program does not prevent constitutional violations, municipal decisionmakers may *eventually be put on*

> *notice* that a new program is called for. Their continued adherence to an approach that they know or should know *has failed to prevent tortious conduct by employees* may establish the ... "deliberate indifference"... necessary to trigger municipal liability.

520 U.S., at 407 (emphases added). By contrast, the Court deemed single-incident liability a "possibility" merely "hypothesized" for a "narrow range of circumstances." *Id.* at 409. It explained further that, in a single-incident scenario, one violation would "substitute for the pattern of injuries *ordinarily necessary* to establish municipal culpability and causation." *Id.* (emphasis added).[1]

This follows from *Canton*'s logic. A pattern shows policymakers should have known flawed training was causing employee misconduct, thus weeding out vicarious liability claims. *See id.* at 407-08 (explaining that a pattern may tend to show fault and causation). A single violation cannot function that way as *notice*. That is why the Court has confined single-incident liability to the "narrow range of circumstances" that cry out for training regardless of previous injuries. *Id.* at 409.

Canton's single-incident paradigm is nothing like this case. When a city offers no deadly force

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[1] Circuit decisions confirm this. *See, e.g., Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (CA5 2010) (explaining that failure-to-train "generally require[s] that the plaintiff demonstrate a pattern," and that the "single-incident exception" is "narrow") (citations omitted); *accord: Carr v. Castle*, 337 F.3d 1221, 1229 (CA10 2003); *Berg v. Cty. of Allegheny*, 219 F.3d 261, 276 (CA3 2000).

training to armed police officers, it announces a callous indifference to the rights of every person those officers will arrest. *See Canton*, 489 U.S., at 390 n.10. A chasm lies between that scenario and a prosecutor's *Brady* decision. Unlike police officers, prosecutors are already equipped by professional education and ethical safeguards to follow *Brady*. If a district attorney decides not to reinforce their existing skills with formal instruction, that does not conceivably put him in the same category as the city official who arms untrained officers and hopes for the best. *See* Blue Br. at 25-36.

This does not imply that district attorneys have no duty to train simply because prosecutors graduated law school. Red Br. at 47; Br. for *Amici Curiae* Fmr. DOJ Officials *et al.* ("Fmr. DOJ Br."), at 13. Petitioners have never claimed that prosecutors become *Brady* experts by passing the bar. They do, however, enter the job with a skill set that enables them to understand and apply legal principles. To the extent it assists them, additional *Brady* training is undoubtedly worthwhile, but that is far from saying district attorneys are *deliberately indifferent* for not instituting it. While it is evident how a city should train police, it is far less clear how a district attorney should, in the abstract, effectively train prosecutors to avoid erring in the course of complicated and fact-driven legal analyses. Basing *Canton* liability on such an error—absent a pattern of misconduct linking it to a specific training flaw—dissolves municipal into vicarious liability.

Thompson thus offers no reason why the pattern requirement should not apply to the claim that a district attorney's office failed to train on *Brady*. Requiring a pattern does not create a "blanket exemption" for district attorneys, *see* Red Br. at 45, but simply means *Canton* applies to them as to other municipalities. Nor does it amount to a "request for one free *Brady* violation" before section 1983 liability can attach. Fmr. DOJ Br. at 30. Every violation demands judicial redress, but not necessarily in the form of civil liability. Thompson's *amici* cannot seriously contend that a *Brady* violation is "free" unless it results in money damages.

Thompson's argument boils down to this: Connick was "aware" that prosecutors routinely face *Brady* decisions; that such decisions are often difficult; and that getting *Brady* wrong violates the Constitution. Red Br. at 27, 39-40. But if *Canton* turned on mere "awareness" of these unremarkable facts, then single-incident liability would fasten to every significant decision a prosecutor makes. *Canton* focuses on something quite different. It requires awareness, not of risks in general, but awareness that a lack of specific *training measures* will make violations occur. *See* 489 U.S., at 390 (inquiring whether "the need for more or different training is so obvious" and whether "the inadequacy [is] so likely to result in the violation of constitutional rights"). Thompson simply misses that *Canton* is not concerned with "a generalized showing of risk," *Bryan Cty.*, 520 U.S., at 410, but rather with a particular, conscious disregard for training.

III. THE JURY WAS ALLOWED TO IMPOSE LIABILITY BASED ON THE BLOOD SUPPRESSION ALONE.

Besides diluting what single-incident liability means, Thompson also denies this is a single-incident case at all. Principally, he claims that there were numerous other *Brady* violations. These claims are not only baseless, *see infra* part III.B, but irrelevant: the jury was allowed to impose liability based on the blood suppression alone.

A. The jury instructions framed this as a single-incident case.

The district court ruled repeatedly that Thompson's claim qualified for single-incident treatment. Both in denying summary judgment and in crafting jury instructions, the court ruled that Thompson need prove no pattern. *See* Pet. App. 139a-142a. The court expressly relied on *Canton*'s single-incident hypothesis, *id.* at 139a (quoting *Canton*, 489 U.S., at 390 n.10), and drew its deliberate indifference instructions directly from *Walker v. City of New York*, 974 F.2d 293, 300 (CA2 1992), which first held that *Brady* could support single-incident liability. Joint Appendix ("App.") 828; Blue Br. at 33-34; *see also* Pet. App. 142a (relying on *Walker*). The jury was thus asked whether a *Brady* decision "*involved a difficult choice* or one that prosecutors had a history of mishandling." App. 828 (emphasis added). This allowed it to find the office deliberately indifferent to training based on a single violation.

The only possible candidate for that violation was the blood evidence. The court instructed the jury that "the non-produced blood evidence and the resulting infringement of Mr. Thompson's right to testify in the murder case violated his constitutional rights as a matter of law." App. 825. It explained that "the only issue that you need to decide concerns whether a policy, practice, or custom of the District Attorney's Office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence." *Id.* The court refused to instruct the jury whether other non-disclosures violated *Brady*. Transcr. Vol. IV, p. 1003 (explaining it "was not going to ask the jury ... was this other stuff also *Brady*").

B. There were no other *Brady* violations.

Thompson, however, insists that the jury could have based liability on a "course" of additional violations in his murder trial. Red Br. at 5-6, 18-20, 25. Thompson's argument fails for numerous reasons. Most obviously, even *assuming* other violations, the instructions still erroneously allowed the jury to impose liability for the blood suppression alone. That requires overturning the verdict. *See supra* part I.

Moreover, the jury was never asked to find other violations. It was told the blood suppression violated *Brady* and that the "only issue" was whether the office caused it. App. 825; *see also* Transcr. Vol. IV, p. 1001-05. The jury was never instructed to decide whether Thompson's disconnected evidence constituted additional *Brady*

violations; it was merely told it could "consider all of the evidence" in assessing deliberate indifference. App. 828. Even had it been asked to find other violations, that is a question of law juries cannot decide. Blue Br. at 50.

In any event, Thompson proved no other violations. He points to police reports supposedly exculpating him or impeaching two witnesses at the murder trial. *See, e.g.,* Red Br. at 5-6; 19-20. Yet Thompson made virtually the same arguments on federal habeas and was rejected. *See Thompson v. Cain*, 1997 WL 79295, *9-*16 (E.D. La. Feb. 24, 1997) (unpublished); *Thompson v. Cain*, 161 F.3d 802, 805-08 (CA5 1998).[2]

Nonetheless, Thompson claims that such non-existent violations somehow impugned prosecutors' grasp of *Brady*. For instance, he relies heavily on witness Paul Schliffka's description of the murderer (recorded in police reports) with "close-cut" or "short" hair. App. 569, 612. Thompson says the reports were *Brady* material since Schliffka's description differed from Thompson's "full 'Afro'"

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[2] Moreover, the habeas courts rejected *Brady* claims as to a wider range of materials than the police reports. *See* 1997 WL 79295, at *9 (cataloguing seven items); 161 F.3d, at 806 (cataloguing nine items). Thompson suggests that the parties stipulated in his civil trial that non-disclosure of these items violated *Brady*. *See* Red Br. at 19; App. 20-21 (citing "stipulation" that listed "16 items containing favorable evidence that was not provided to Thompson in 1985"). He is mistaken: the stipulation merely stated the items "were not provided" to Thompson but explicitly reserved whether the items were admissible and whether they "constitute[d] *Brady* material." App. 20-24 nn.1-5.

hairstyle. Red Br. at 19. Because lead prosecutor Eric Dubelier disagreed, *see* App. 140-43, 293-300, 307-35, 349, Thompson denounces Dubelier's "total confusion about *Brady* and the indifference to *Brady* that pervaded the office." Red Br. at 19.

It is Thompson who is confused: there was no *Brady* violation concerning the Schliffka description. The description was not even "suppressed" because Thompson's defense counsel was actually aware of it during the murder trial. *See, e.g., United States v. LeRoy*, 687 F.2d 610, 618 (CA2 1982) (material not suppressed if defendant "either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence").[3] Thompson also fails to note that the prosecution disclosed Schliffka's identity; that Schliffka himself testified; that he went into far more detail than the reports about the perpetrator's hairstyle; that he was cross-examined about it; and that he admittedly could not identify Thompson from a photo array. *See* App. 313-18, 328-35, 349; Transcr. Ex. 137, at 91-105, 94-97, 103-05 (*State v. Thompson*, May 7, 1985). Thus, the description also could not have impeached Schliffka nor materially affected the outcome. *See, e.g., Wilson v. Whitley*, 28 F.3d 433, 442 (CA5 1994) (undisclosed report immaterial where witness testimony is largely consistent with it); *accord: United States v. Bolden*, 545 F.3d 609, 623 (CA8

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[3] A testifying officer used the report to refresh his memory of what Schliffka had said. App. 666-68. Thompson's counsel was thus entitled to inspect the report and use it to cross-examine the officer. LA. CODE EVID. art. 612(B) (2006).

2008); *United States v. Ellis*, 121 F.3d 908, 916-18 (CA4 1997).

The debate over the Schliffka description was thus entirely artificial. Even assuming the description was not disclosed (*but see* App. 293-94, 304, 314), that did not violate *Brady*. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (explaining that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense").[4] In any event, the real issue was not Dubelier's grasp of *Brady* in this instance, but whether the office's record showed Connick consciously ignored the need for formal training. How that was shown by debates over materials whose non-disclosure did not violate *Brady* is a mystery.

IV. THOMPSON INVENTS NEW FORMS OF *CANTON* LIABILITY.

In another attempt to distance himself from the single-incident theory, Thompson rewrites *Canton*. He claims a "third way" of demonstrating deliberate indifference: "direct evidence" of "actual" policymaker indifference to training. Red Br. at 27. Related to this, Thompson also claims that liability can be shown by a "culture of indifference." Red Br. at 22. Neither theory is supported by the Court's precedents.

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[4] It is ironic that Thompson would place such weight on this claim, since he did not even raise it on federal habeas. *See* Ex. 21 to Pl. Mem. in Opp'n to Summ. J. at 36-45 (making different *Brady* arguments as to the report).

A. Connick's personal grasp of *Brady* is irrelevant.

It is axiomatic that *Monell* and *Canton* define liability for municipalities, not for individuals. *See, e.g., Monell v. Dept. of Social Serv's*, 436 U.S. 658, 690 (1978) (holding that "municipalities and other local government units [are] included among those persons to whom § 1983 applies"). To be sure, a municipal policymaker may be one person, whose order therefore constitutes "official policy." *See, e.g., Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986) (holding county prosecutor's order as "final decisionmaker" could create liability). But that person's actions *not* done in a policymaking capacity—"personal" actions or opinions—have nothing to do with liability of the entity itself.

Thompson's novel "actual indifference" prong blurs this distinction. It glosses over the uncontradicted evidence of Connick's actions *as policymaker* taken over his 29-year tenure, in favor of evidence of Connick's *personal* understanding of *Brady*. The latter is patently irrelevant to anything that Connick did as policymaker and thus has no bearing on the office's liability. *Cf. Monell*, 436 U.S., at 694 (concluding that a local government may be sued for a "policy or custom ... made ... by those whose edicts or acts may fairly be said to represent official policy").

Nothing shows this better than Connick's remark that he "stopped reading law books" in 1974, which Thompson recycles four times. Red Br. at 8, 23, 38, 43. But Thompson gives only a fragment of Connick's statement:

> If you understand the way the office operated, I, I was not practicing law there. I was running an office. It was a big staff of well over 200 people. And I stopped reading law books when I was – when I became the DA, and looking at opinions. And my concern was the operation, the total operation of the office.

App. 144. The remark, in other words, has no bearing on the substance of Connick's *policymaking* role.

Connick did many things as policymaker. For instance, he streamlined how the office handled its massive caseload and he improved prosecutors' supervision and instruction, earning the praise of a widely cited *Stanford Law Review* article. Blue Br. at 3-9, 42-45; Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). But Connick's policymaking role—as his "stopped reading law books" remark conveyed—did not extend to issuing detailed judgments about prosecutors' legal obligations. For instance, Connick stationed "junior" and "senior" prosecutors in each court section as a teaching tool; he did not supervise the junior attorneys himself. He improved the process for screening thousands of cases; he did not prepare the screening forms himself. He had advance sheets distributed to prosecutors; he did not deliver lectures on the latest jurisprudence. *See, e.g.*, Blue Br. at 4-6, 8-9.

On Thompson's view, however, Connick's remark that he "stopped reading law books" meant that no one in the office read them. This confuses

evidence of Connick's own personal grasp of *Brady* with his role as policymaker. Merely because Connick was "the sole policymaker," it cannot follow that any confusion of his about *Brady* sent cracks running through every prosecutor's judgment. Merely because Connick may have garbled *Brady*'s requirements at times, *see* App. 148-54, 441-42, 550-51, this cannot mean the office's prosecutors—over 700 of them—had been similarly misinformed by Connick himself over his 29-year tenure. Connick was an administrator, not an oracle.

B. The verdict forecloses Thompson's "culture" argument.

Thompson also argues that the jury could have based liability on a "culture of indifference" to *Brady*. *See* Red Br. at 22-23. But this fails the most basic requirement of municipal liability. Under *Canton* a plaintiff must prove more than a municipal "culture"; he must demonstrate a municipality's "deliberate choice to follow a course of action." *See* 489 U.S., at 389 (quoting *Pembaur*, 475 U.S., at 483-84 (plurality op.)).

As a major part of this argument, Thompson says the jury could have based liability on erroneous guidance provided by the 1987 office handbook. Red Br. at 9-11, 41-43. This is impossible, first, because the jury found that Thompson was not injured "by an official policy of the District Attorney." App. 830. The handbook unquestionably expressed office policy—*see, e.g.*, App. 392-93, 449-50, 467-68—and Thompson

cannot circumvent the verdict by using the handbook as a surrogate for training.[5]

In any event, it is not true that the handbook provided "objectively wrong" *Brady* guidance. Red Br. at 42. The handbook, on its own terms, does not purport to instruct prosecutors on *Brady* at all. The very paragraph Thompson attacks shows this: it commands prosecutors to "be familiar with the law regarding exculpatory information possessed by the State." App. 704.[6] Moreover, the sentence[7] on which Thompson trains his criticism is merely descriptive and does not purport to define the reach of *Brady*.[8] Similarly, the paragraph uses the word

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[5] The verdict also forecloses Thompson's argument that Connick's "restrictive disclosure policy" supported liability. Red Br. at 39-40, 14-15. Moreover, Connick did not testify that this policy "heightened the risk" of *Brady* violations: he merely agreed that not producing every police report "can lead to *Brady* violations," but "it doesn't follow that it will." App. 159.

[6] This is precisely what office representative Val Solino tried to explain. Solino was asked to address the hypothetical of a prosecutor "looking to the handbook for guidance" on *Brady*, but he rejected the premise that a prosecutor would have used the handbook in that way. *See* App. 483-84 (urging that "[i]f you're asking what I would have done in 1985, I wouldn't have been resorting to this").

[7] "In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material—that is, information in the possession of the State which is exculpatory regarding the defendant." App. 704.

[8] Solino never "conceded" that this sentence was "deficient," Red Br. at 42, but testified only that it did not "completely describe *Brady*" and agreed that *Brady* is "much broader." App. 482.

"exculpatory" to refer generically to *Brady* material, not to define *Brady*'s legal parameters. This Court has used "exculpatory" in the same sense. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 628 (2002) (explaining that "*exculpatory* evidence includes 'evidence affecting' witness 'credibility'") (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining that "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose *exculpatory* evidence") (emphases added).

V. THE JURY WAS ALLOWED TO INFER CAUSATION FROM ONE INSTANCE OF PROSECUTORIAL MISCONDUCT.

The single-incident theory also allowed the jury to nullify *Canton*'s stringent causation standard. Thompson had to prove that a lack of formal *Brady* training was the "moving force" behind the violation. *Bryan Cty.*, 520 U.S., at 404. But the jury was allowed to infer that causal link from the blood suppression alone. *See* App. 826 (allowing jury to find an actionable policy based on a failure to act "so likely to result in the very violation that occurred in this case"); Blue Br. at 54-60. That is an inadequate basis for causation. *See, e.g., Tuttle*, 471 U.S., at 821 (plurality op.); *id.*, at 830 (Brennan, J., concurring). It is no response to say the jury could have relied on other evidence of causation. *See, e.g.*, Red Br. at 56-61. Because the jury could have relied on the single violation alone, the verdict must be invalidated. *See supra* part I.

Additionally, Thompson's alternate causation theories fail for the same reasons as his fault arguments. For instance, supposedly inaccurate guidance from the handbook could not have caused the violation because the jury rejected "office policy" as a cause. Red Br. at 59; *see supra* part IV.B. Nor could the jury have inferred causation from "the sheer number of [*Brady*] violators and violations," because Thompson failed to demonstrate any violation beyond the blood evidence. Red Br. at 60; *see supra* part III.B.

Thompson ultimately retreats to speculation. He theorizes the jury could have rejected overwhelming evidence that a "single rogue prosecutor" buried the report, and instead have linked the suppression to three or four prosecutors' poor grasp of *Brady*—a defect supposedly caused by bad training. Red Br. at 57. This flimsy chain of inferences ignores the evidence, but, even if it were plausible, it would fall short of *actual* causation.

At most, Thompson would have proven that four prosecutors misunderstood *Brady*'s application to the blood evidence. But he showed no direct link between that putative misunderstanding and a training deficiency, which is what *Canton* requires. Thompson merely claims that, had these prosecutors been better instructed, that may have prevented the suppression. Under *Canton* that is not enough. Causation cannot rest on evidence merely that certain employees were poorly trained, made mistakes, negligently administered office processes, nor "that [the] injury ... could have been avoided if an officer had had better or more

training, sufficient to equip him to avoid the particular injury-causing conduct." *Canton*, 489 U.S., at 391.

The admitted absence of any pattern of violations destroys Thompson's theory. Over Connick's 29-year tenure, anywhere from fifty to seventy prosecutors a year handled thousands of blood tests and other scientific reports. Yet Thompson could point to only four published opinions reversing convictions on *Brady* as of Thompson's 1985 trial, and none of those concerned the kind of evidence here. *See* Red Br. at 15-16; Blue Br. at 46-48. Thompson's other evidence impugning the office's *Brady* record is shockingly thin: *i.e.*, the testimony of Connick's political opponent based on cases whose names he could not remember and on a supposed study by "[s]ome kind of national group" which appears nowhere in the record. *See* Blue Br. at 51; App. 129-30, 133.[9]

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[9] Thompson's *amicus*, the Innocence Network, fares no better. *See* Brief of the Innocence Network as *Amicus Curiae*, at 24-25. It claims a "shockingly high" rate of *Brady* violations under Connick, but the decisions it cites show the opposite. Of the nineteen cases in which *Brady* violations were *alleged*, the claims were rejected in fifteen. In four of those, the *Brady* claims were so meritless that the Louisiana Supreme Court did not mention them in its published opinion. *See, e.g.*, *State v. Deboue*, 552 So.2d 355 (La. 1989); *State v. Anthony*, 1998-0406 (La. 4/11/00); 776 So.2d 376; *State v. Frank*, 99-KA-0553 (La. 1/17/01); 803 So.2d 1; *State v. LaCaze*, 99-KA-0584 (La. 1/25/02); 824 So.2d 1063. Of the four remaining decisions, one was reversed on other grounds. *See State v. Cousin*, 96-KA-2973 (La. 4/14/98); 710 So.2d 1065. Of the three decisions finding a *Brady* violation, one is *this* case (*State v. Thompson*, 2002-K-0361 (La. App. 3 Cir.

If Thompson's accusation of "broad" *Brady* misconceptions were valid, he should have easily amassed ample material for a pattern argument. Yet the evidence showed that prosecutors were routinely complying with *Brady* in general, and were disclosing all lab reports regardless of whether they fell under *Brady*. *See* Blue Br. at 58-59 (discussing uncontradicted evidence that office policy was to disclose all lab reports). The irresistible conclusion is that the tragic suppression in Thompson's case arose from "factors peculiar to the [employees] involved in [that] particular incident," *Bryan Cty.*, 520 U.S., at 408, and had nothing to do with a training deficiency.

Indeed, one need not speculate about what actually caused the suppression. The dramatic and uncontradicted evidence showed that one of the robbery prosecutors, Gerry Deegan, confessed that he had "intentionally suppressed blood evidence" exculpating Thompson. Other testimony showed that Deegan removed the evidence from the evidence room and failed to return it. Blue Br. at 11-13, 55-56.

Thompson understandably tries to minimize this shocking revelation. He speculates that Deegan might have harbored "misgivings" about following other prosecutors' orders not to produce

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7/17/02); 825 So.2d 552); the other two (*Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Bright*, 2002-KP-2793 (La 5/25/04); 875 So.2d 37) involved violations adjudicated long after 1985 and which had nothing to do with the kind of suppression in Thompson's case.

the report. Red Br. at 58-59. This ignores what Deegan said and did. Deegan did not express vague remorse: he unburdened his conscience of a wrong he had deliberately committed. Furthermore, even assuming Deegan left open the possibility that others conspired with him, that still fails to connect the suppression to training. It only means there may have been four malefactors instead of one. Thompson's brief is particularly evasive on this point. He quotes the testimony of prosecutor John Jerry Glas, who as a result of his investigation deemed the single rogue prosecutor theory "ridiculous." Red Br. at 61. Thompson omits that Glas thought it "ridiculous" only because he believed *two other* prosecutors had conspired with Deegan. App. 535. Glas, in fact, prepared indictments against them for obstruction of justice and malfeasance in office. App. 536-39.

VI. EXPANDING *CANTON* WILL EXPOSE DISTRICT ATTORNEYS TO RUINOUS CONSEQUENCES.

Thompson implausibly minimizes the impact of extending *Canton* to single instances of prosecutor error. Red Br. at 53-55. But this expansion would encompass myriad legal judgments made by prosecutors, exposing district attorneys to ruinous liability and to federal management of their training practices.

Thompson offers no plausible basis for limiting training liability to *Brady* violations. *See* Red Br. at 54-55. The jury was allowed to find liability where a district attorney knows prosecutors confront a "difficult choice" that "will frequently cause" constitutional violations. App. 828. That

lays the groundwork for liability based on prosecutors' routine judgments respecting, for instance, search and seizure, *see, e.g., Burns v. Reed,* 500 U.S. 478, 49-92 (1991), probable cause, *Kalina v. Fletcher*, 522 U.S. 118, 121 (1997), *Miranda* rights, *Johnson v. Rex*, 474 U.S. 967 (1985) (Burger, C.J., dissenting from denial of cert.), initiating a prosecution, *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976), evaluation and presentation of evidence, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993), and trial arguments, *Caldwell v. Mississippi*, 472 U.S. 320, 335-36 (1985).

Thompson overlooks another consequence of expanding *Canton*: it would "engage the federal courts in an endless exercise of second-guessing [district attorneys'] employee-training programs." *Canton*, 489 U.S., at 392. Thompson does not specify what sort of training regime would shield district attorneys from *Canton* liability. While certain former Justice Department officials identify a recently undertaken "comprehensive, multi-part approach designed to provide federal prosecutors with tools to address their discovery obligations," they assure the Court that district attorneys need not adopt the totality of such measures. Fmr. DOJ Br. at 12 (conceding that, due to lack of resources, "local offices cannot be expected to replicate DOJ's extensive training efforts"). *Which* measures they would have to adopt on pain of section 1983 liability would presumably be worked out over years of federal litigation.

Thompson's urged expansion of *Canton* actually risks discouraging prosecutors from remedying earlier errors. In the *Brady* context, for example, a prosecutor assigned to post-conviction proceedings might be reluctant to search for exculpatory information for fear that its disclosure would trigger a lawsuit, like Thompson's, with the potential to shutter his office. *Cf. Warney v. Monroe County*, 587 F.3d 113, 126 (CA2 2009) (noting, in the prosecutorial immunity context, that "[p]rosecutors facing tough choices as to whether or not to seek exculpatory information post-conviction, should not have to fear . . . liability," because "such a peril would be an incentive to avoid exculpatory inquiries"). Just as the "public trust of the prosecutor's office would suffer if [the prosecutor] were constrained in making every decision by the consequences in terms of his own potential liability," *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976), prosecutors should not be made to choose between remedying an injustice and bankrupting their office.

When someone is wrongfully convicted, state compensation schemes—not awkward expansions of *Canton*—are the proper means of redress. Louisiana is among 27 states, in addition to the federal government and the District of Columbia, that have adopted statutory compensation schemes. *See* http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf, p. 15 (citing LA. REV. STAT. ANN. § 15:572.8 (2010) (last visited Sept. 7, 2010)). One advocate for such measures, the Innocence Project, rightly observes that "[a]fter years of fighting to prove their innocence, exonerees

need a safety net, not another long legal battle." *Id.* at 13. Louisiana has already agreed to settle Thompson's state wrongful conviction claim for the statutory limits. Pet. at 6 n.6.

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Judge John Minor Wisdom once observed that "[i]n reviewing [a] ... case when the plaintiff has been injured grievously, hard as our sympathies may pull at us, our duty to maintain the integrity of substantive law pulls harder." *Turner v. Atl. Coast Line R.R. Co.*, 292 F.2d 586, 589 (CA5 1961); *see* Pet. App. 43a. John Thompson was grievously injured by a prosecutor's wrongdoing. The massive verdict against his former employer, however, rests on vicarious liability and nothing more. This was never a failure-to-train case, and pretending otherwise invited nullification of the principle that a municipality is never liable for employee fault. *See Canton*, 489 U.S., at 399 (O'Connor, J., concurring) (observing that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*"). The verdict must be overturned.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-571

IN THE

Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* ALLIANCE DEFENSE FUND AND CATO INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether governments should be subject to *respondeat superior* liability in the same way private employers are?

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INTEREST OF *AMICI CURIAE*[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of American who object to the erosion of religious liberty in our society. Its allies include more than 1,800 lawyers and public interest law firms. ADF has advocated for the rights of Americans to exercise their religious beliefs in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 such cases and legal matters, including cases before this Court such as *Winn v. Arizona Christian School Tuition Organization*, 562 F.3d 1002 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 3350 (May 24, 2010) (09-987), *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksgerg*, 521 U.S. 702 (1997). The limitation of *respondeat superior* liability established in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978), creates a sometimes-

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[1] The parties gave blanket consents to the filing of amicus curiae briefs. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

insurmountable obstacle to obtaining full redress for many ADF clients whose constitutionally protected rights have been violated.

The CATO INSTITUTE was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in a variety of cases calling for the elimination of roadblocks to government accountability, including *Pottawattamie County v. McGhee*, 130 S.Ct. 1047 (2010), *Alvarez v. Smith*, 130 S.Ct. 576 (2009), and *Dupuy v. McEwen*, 495 F.3d 807 (7th Cir. 2007), *cert. denied*, 128 U.S. 2932 (2008). The instant case concerns Cato because it calls for all levels of government to be held accountable to constitutional mandates and to deeply rooted legal principles.

SUMMARY OF ARGUMENT

This should be a simple case: Mr. Thompson's rights were violated by the actions of a prosecuting attorney – an agent of the Parish District Attorney – who was plainly acting in the course and scope of his employment. If the doctrine of *respondeat superior* were applied as it would be in most other contexts, the Parish District Attorney (entity) would be liable

for the constitutional violation committed by one of its employees.

This Court declared in 1978, however, that Congress did not intend for the Civil Rights Act of 1871 to hold local governments liable for constitutional violations committed by their agents and employees. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692-695 (1978). This conclusion involved an issue that was not raised by the facts and had not been addressed by any party. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting). Nonetheless, this Court's later *Tuttle* decision described *Monell*'s discussion of *respondeat superior* as a "holding" and followed it on *stare decisis* grounds, scarcely discussing whether the *Monell* analysis accurately stated the law. *Tuttle*, 471 U.S. at 818 n.5. In so doing, *Tuttle* shifted the analysis: instead of considering whether a constitutional violation had been committed by an agent of a government acting within the scope of his authority, the question became whether the violation had been committed pursuant to some stated or implied "policy" of the governmental entity. As a result, this Court currently is forced to resolve the issue presented here: whether a parish district attorney can be held liable for constitutional violations committed by its assistant prosecutors in the course of bringing charges on its behalf.

Amici believe the *Monell* rule unfairly circumscribes the protections of 42 U.S.C. § 1983 by imposing a restriction on municipal liability that is unwarranted by either the text or history of the

statute. They therefore urge that the *Monell* rule be overturned so that municipalities hereafter may be subject to liability for the constitutional violations of their agents and employees according to the ancient common law rule of *respondeat superior*.

Although the *Monell* rule is entitled to respect as a past holding of this Court, a precedent decision can and should be abandoned where adherence to *stare decisis* "puts us on a course that is sure error." *Citizens United v. Federal Election Com'n*, 588 U.S. ___, ___, 130 S. Ct. 876, 911-912 (2010). As this Court explained in 2009, "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. ___, ___, 129 S. Ct. 2079, 2088-2089 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986))." *Id.* at 912. This Court has also examined whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. ___, ___, 129 S. Ct. 808, 816 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)).

This brief will explain why the *Monell respondeat superior* rule was poorly reasoned and legally incorrect, and should therefore be overturned.

ARGUMENT

I. REFUSING TO APPLY *RESPONDEAT SUPERIOR* TO GOVERNMENTAL ENTITIES CONTRAVENES THE POLICIES AND EQUITIES UNDERLYING THE DOCTRINE.

Monell's cursory analysis of *respondeat superior* liability claimed that the justifications for the doctrine were inapplicable to the purposes of § 1983. That analysis was incorrect.

A. The Equitable and Policy Bases for *Respondeat Superior* Known by the Drafters of § 1983 Support the Doctrine's Application to Municipalities.

Every basis for applying the doctrine of *respondeat superior* to a corporate employer applies with equal logical and practical force to a municipal employer. Even the *Monell* decision conceded that interpreting § 1983 had to proceed from the nineteenth-century conception of the *respondeat superior* doctrine as applied then. *Monell*, 436 U.S. at 691-692 (legislative history as basis for decision); *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 & n.7 (1986) (*Monell* rested primarily on legislative history including inferences from rejection of the Sherman Amendment). If the underlying bases for the *respondeat superior* doctrine, known from even before § 1983 was enacted, still resonate with both commercial and municipal corporations, then the doctrine should apply to municipalities – and certainly so when the

municipalities' agents have violated constitutional rights.

1. Municipal Governments and Their Agents Stand In "Unity."

The *respondeat superior* doctrine's first basis is "unity." Nineteenth-century law considered the master-servant relationship as an instance of the "legal unity of the principal and agent." David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 And The Debate Over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2197-2198 (2005) ("Achtenberg"). The legal authorities and precedents affirmed the maxim that acts of the servant are deemed the acts of the master. *See McCafferty v. Spuyten Duyvil & P.M.R. Co.*, 61 N.Y. 178, 181 (1874) ("Every man is answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own"); *New Orleans, J. & G.N.R. Co. v. Bailey*, 40 Miss. 395, 452 (1866) ("[the] legal unity of the principal and agent, in respect to the wrongful or tortious, as well as the rightful acts of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history").

According to common understanding among Americans, police officers enforcing the laws *are* the police department. When people imagine what "the government" is going to do, the officers *are* "the government." Not mere employees, policemen who

perform the government's functions are officers with a higher responsibility and calling. Annot., *Policemen as public officers,* 84 A.L.R. 309 (1933) (collecting cases nationwide). Neither the mayor, nor the city council, nor the police chief, nor the administrative assistant, nor any judge will go knocking on a citizen's door to conduct a search, make an arrest, or generally enforce the law.

In the eyes of citizens, the police officers on the street *are* the government. Likewise, the prosecutors who bring charges *are* the government. Prosecutors are public officers who advance the laws on behalf of the government. Such officers are in unity with their governmental employer. The first basis for *respondeat superior* liability applies.

2. Municipal Governments Control and Direct Their Agents.

The doctrine's second basis is "control and direction." Liability flows naturally from the employer's legal power to control or direct his servant's actions. *See,* Achtenberg, *supra*, at 2198-2199. The prevailing view when § 1983 was enacted was that "[t]he responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant." *Callahan v. The Burlington & Missouri River R. Co.*, 23 Iowa 562 (1867); *accord, Ham v. City of New York*, 70 N.Y. 459, 461-462 (1877) ("the doctrine of *respondeat superior* . . . is based upon the right of the employer to select his servants, to discharge them if careless, unskillful or incompetent, and to direct and control them while in his employ"); *J.J. Du Pratt v. Lick*, 38 Cal. 691, 692

(1869) (the '"power of selection or direction" is fundamental to *respondeat superior* liability). The employers' liability is the necessary consequence of their "duty to so control [their servants'] acts that no injury may be done to third persons." *Cuff v. Newark & New York R. Co.*, 35 N.J.L. 17, 23 (N.J. 1870) (powers to hire, control, and fire, give rise to responsibility for employees' misconduct on the job).

It is undisputable that a municipal government has the legal and actual power to control the selection, training, deployment and conduct of its police officers and of its prosecutors. Likewise the municipality directs the actions of these public officers, by regulations, by policies, and by the perimeter of the municipality's toleration of conduct. The municipality knows or has notice of what its employees are doing, and it can discipline or dismiss errant officers. It is to these substantial "control and direction" situations that *respondeat superior* especially applies.

3. Municipal Governments Expressly or Implicitly Warrante the Proper Actions of Their Agents.

The doctrine's third basis is "warranty." Achtenberg, *supra*, at 2200-2201. By entrusting work to employees, the courts have held, an employer implicitly represents to the public that the employees are careful, competent, and well-intentioned; and if that representation turns out to be false, the employer is liable based on breach of warranty. *Id.*; *see Carman v. Steubenville & I.R. Co.*, 4 Ohio St. 399, 416 (1854) ("public policy and the

safety of others require the master to warrant the fidelity and good conduct of the servant, and, although faultless himself, make him liable for the unlawful conduct of the servant"); *accord, New Orleans, J. & G.N.R. Co. v. Allbritton*, 38 Miss. 242, 265 (1859) (noting that "[i]t is a settled rule, that the principal not only holds out his agent or servant as competent to discharge the duties imposed on him, but 'warrants his fidelity and good conduct, in all the matters of his agency'" [citation omitted]).

"To protect and serve" – the admirable motto of the Los Angeles Police Department[2] – pithily states the city's promise to the citizenry. A warranty is "a promise that a proposition of fact is true." *Black's Law Dictionary* 1586 (6th ed. 1990), quoted in *Hartford Acc. and Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership*, 109 Md. App. 217, 246, 674 A.2d 106 (1996), *aff'd*, 346 Md. 122, 695 A.2d 153 (1997). The citizens trust the police and the prosecutors because the municipalities impliedly warrant that their public officers are careful, competent and well-intentioned agents.[3] Like any commercial enterprise or professional business, municipalities are assumed to stand behind their officers and to take the responsibility for officers' misconduct on the job. Commonly and reasonably, the citizens expect municipalities to be at least as reliable and responsible as the grocery, the auto

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[2] *See http://www.joinlapd.com/motto.html* (accessed on July 29, 2010).

[3] *See Catsouras v. Dep't of Calif. Highway Patrol*, 181 Cal.App.4th 856, 864, 104 Cal.Rptr.3d 352 (2010) ("We rely upon the CHP to protect and serve the public").

repair shop, and the hospital, respectively, would be for their employees' conduct. The implied warranty factor supports applying the doctrine to municipalities.

4. Because Municipal Governments Benefit From Their Agents' Conduct, It Is Equitable to Impose The Risks of Loss Upon the Party Standing to Gain.

The doctrine's fourth basis is "reciprocity." Achtenberg, *supra*, at 2202. *Respondeat superior* has rested on the view that benefits and liabilities should be reciprocal. Entities who hope to benefit from an activity must also bear its costs. Because employers expect to achieve their objectives by their employees' work, it is fair for them to pay for their employees' torts, "thus making the benefit and liability reciprocal." *Id.*, *citing Cardot v. Barney*, 63 N.Y. 281, 287 (1875); *accord, New Orleans*, 40 Miss. at 452.

A municipality is a corporation having functions it must carry out. The municipality acts through agents, and it achieves its objectives via those agents' work. As the Ohio Supreme Court stated long ago:

> Corporations are established in our country for almost every concern of life – political, pecuniary, and eleemosynary. *They govern towns*, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations *they*

> *act by agents*. Where benefits are derived, the corporation enjoys them. Where injury is inflicted, through their means, they ought to be responsible for it.

Goodloe v. City of Cincinnati, 4 Ohio 500, 513 (1831) (emphasis added).

An equity maxim underlies especially this aspect of the doctrine of *respondeat superior*: "no man shall be allowed to take any advantage of his own wrong." *New Orleans*, 40 Miss. at 452. The Court in *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-233, (1959), observed that maxim to be "[d]eeply rooted in our jurisprudence" and "has been applied in many diverse classes of cases by both law and equity courts."

Shielding a municipality from responsibility for the misconduct of its agents contravenes the maxim. "When the [municipality] grades the streets, the object is the benefit of the whole town. If an individual is injured, it is right he should have redress against all upon whose account the injury was perpetrated. *There is no justice in sending him to seek redress from an irresponsible agent.*" *Goodloe*, 4 Ohio at 513-514 (emphasis added).

Not just negligence but actual misconduct under color of law, committed by municipal officers, is part of the risk the municipality takes when it deploys agents to carry out its mission.[4] In that way a

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[4] The adoption of *respondeat superior* would not impose § 1983 liability for negligence. For example, this Court has concluded "that the Due Process Clause is simply not implicated by a

municipal corporation is no different from a commercial one, and there is no principled basis to distinguish the two. *Respondeat superior* doctrine allocates the risk of misconduct in a way that protects consumers and citizens alike. Restatement (Second) of Agency § 219 cmt. a ("with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit").

Outright misconduct by a municipal employee was understood, even in the 19th Century, to be a risk undertaken by municipalities. As the *Goodloe* court explained:

> All corporations act by agencies, and those agencies are *composed of men* who may be influenced by reprehensible motives, or tempted *to do acts not warranted by law*. In this case, the act is charged in the declaration to have been *illegal and malicious*. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is *the plain dictate of justice*, and we see no technical rule of law that forbids us to act upon it.

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negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). Thus, even under a *respondeat superior* theory, municipal corporations would not be exposed to § 1983 liability for the negligent acts of its employees.

Goodloe, 4 Ohio at 514 (emphasis added); *see* Achtenberg, *supra*, at 2202 (citing American and English cases supporting the principle).

B. The *Monell* Decision Contravenes the Anglo-American Constitutional Principle.

The decision in *Monell* runs directly contrary to Blackstone's and Chief Justice Marshall's declarations of settled Anglo-American law on a crucial point. *Monell* held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." The local government may be held legally liable under § 1983, however, when "execution of a government's policy or custom . . . inflicts the injury . . . ." *Id.*, 436 U.S. at 694.

In short, *Monell* immunizes local governments from liability for their employees, agents and officers who violate the constitutional rights of citizens, unless the government's actual policy caused the violation of those rights. Respectfully, the *Monell* rule should be modified to extend vicarious liability to local governments on the principles of equity and equal treatment, which will better protect the rights of *all* citizens.

In opining that *respondeat superior* does not apply to municipalities, the *Monell* decision briefly addressed what the 19th Century drafters of § 1983 would have known about the doctrine. *Monell*, 436 U.S. at 693-694. But *Monell*'s treatment of the issue has been trenchantly criticized by commentators. *See, e.g.*, Achtenberg, *supra*, at 2198-2199; David P.

Strauss, Comment, *Vicarious Municipal Liability: Creating A Consistent Remedial Policy for Local Government Violations of Civil Rights*, 16 CAL. W. L. REV. 58, 88-89 (1980). A correction to the *Monell* dicta should flow from understanding the bases for *respondeat superior* liability.

C. Governments of Free People Must Be Held Liable For Constitutional Violations.

The Supreme Court in the Founding Era thought it obvious that citizens should be empowered to enforce their constitutional rights when a government violates those rights. Chief Justice John Marshall, in *Marbury v. Madison*, 5 U.S. 137 (1803), presented the issue: "If [a citizen] has a right, and that right has been violated, do the laws of this country afford him a remedy?" *Id.* at 162. The Court's answer was that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Id.* at 163.

Quoting Blackstone's *Commentaries*, the *Marbury* decision continued: "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Id.* (citation omitted). "The government of the United States has been emphatically termed a government of laws, and

not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

That same principle is embodied in the maxim, "equity will not suffer a wrong to be without a remedy." 27A Am. Jur. 2d *Equity* § 85 (Online ed. 2010); *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U.S. 459, 472, 46 S. Ct. 166 (1926); *see Terry v. Terry*, 10 La. 68 (1836) (noting the "absurdity of a wrong without a remedy"). Supreme Court jurisprudence should consistently protect citizens by maintaining a legal environment promoting the promises of both *Marbury* and equity.

Marbury promised Americans their constitutional rights would be protected by the courts. Equitable principles support the policy rationales recognized for centuries that would hold municipalities liable for constitutional violations perpetrated by their officers under color of law. The near-total absence of municipality *respondeat superior* liability, as declared by *Monell*, should be corrected to afford citizens effective redress for violations of their fundamental rights protected by the Constitution.

D. Enforcing the doctrine of *respondeat superior* will simplify § 1983 litigation and better allocate legal resources.

Enforcing the doctrine *respondeat superior* will simplify § 1983 litigation and better allocate legal resources. This is true for at least two reasons.

First, litigation over the doctrine of qualified immunity, which has caused great confusion and uncertainty, would be drastically reduced. *See Pearson v. Callahan,* 555 U.S. ___, ___, 129 S. Ct. 808, 816 (2009) (overruling *Saucier v. Katz,* 533 U.S. 194 (2001)). Without the imposition of *respondeat superior,* § 1983 actions are brought against individual employees who are entitled to qualified immunity. With the imposition of *respondeat superior,* however, § 1983 actions will be brought against municipal corporations that are not afforded qualified immunity. *Owen v. City of Independence,* 445 U.S. 622, 650 (1980). The question of whether an agent of a government was acting within the scope of his authority is a simple one. The vast legal recourses spend on arguing the doctrine of qualified immunity can be better allocated to important questions of constitutional injury.

Second, suits based on negligent training, which require much discovery and in many cases expert witnesses, will be virtually eliminated. If a municipal corporation is liable for its employees' conduct, the question of training becomes irrelevant. The type and amount of training will be left to the discretion of the municipal corporation because it bears the risk of misconduct of its employees. The focus of litigation will be where it should be — on the conduct of the government employee and not on how the employee was trained.

II. THIS COURT'S DEFERENCE TO *MONELL*'S DICTA HAS PREVENTED EXAMINATION OF THE LEGAL AND FACTUAL MERITS OF APPLYING THE *RESPONDEAT SUPERIOR* DOCTRINE TO MUNICIPALITIES.

Although *Monell*'s rejection of *respondeat superior* has sometimes been described as a holding, it plainly was not. Indeed, Justice Stevens refused to join that portion of the Court's opinion because it was "merely advisory and [] not necessary to explain the Court's decision." *Monell*, 436 U.S. at 714 (Stevens, J., concurring in part). As Justice Stevens explained in a subsequent decision, "the commentary on *respondeat superior* in *Monell* was not responsive to any argument advanced by either party and was not even relevant to the Court's actual holding." *Tuttle*, 471 U.S. at 842 (Stevens, J., dissenting).

Because the *Monell* discussion of *respondeat superior* was unbriefed dicta, it should not have been followed with *stare decisis* deference. As this Court has explained, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006). Indeed, this Court's longstanding refusal to rely on dicta as binding precedent extends back nearly two centuries to when Chief Justice Marshall explained, "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for

decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

While the *Monell* dicta was cited in this Court's holdings in *Tuttle* and other cases entitled to *stare decisis* deference, its origin as *unbriefed* dicta should weigh heavily against continued reliance upon *Monell*'s purported rule without the thorough historical and statutory analysis it deserves. As demonstrated at length herein, a proper analysis would conclude that § 1983 *does* incorporate the doctrine of *respondeat superior* where agents or employees of a local government commit civil rights violations while acting in the course and scope of their employment. *Amici* urge that this Court conduct such an analysis and correct the erroneous rule it declared in *Monell*.

III. *MONELL*'S HISTORICAL ANALYSIS WAS BADLY FLAWED BECAUSE THE WELL-ESTABLISHED PRACTICE OF HOLDING MUNICIPALITIES LIABLE UNDER *RESPONDEAT SUPERIOR* WAS NOT REJECTED IN THE § 1983 LEGISLATIVE HISTORY.

The *Monell* rule was based on two misreadings of the law. First, *Monell* misread the common law treatment of *respondeat superior* at the time § 1983 was enacted. Second, *Monell* misread the statute's legislative history. *Monell* conflated statements of congressional concern about the unprecedented concept of holding municipalities liable for acts of purely private citizens, with the unremarkable practice of imposing liability for acts of government employees and agents.

A. *Respondeat Superior* Is a Fundamental Principle of Agency Law.

From its origins, imputed negligence, known also as vicarious liability or *respondeat superior*, has levied liability against masters for the tortious actions not only of servants, but also of slaves, spouses, and even inanimate objects. *See* W. Page Keeton *et. al.*, *Prosser And Keaton On Torts* § 69 (5th ed. 1984). Early English law moved from strict liability jurisprudence for the acts of the servant imputed to the master in the 16th Century to court application of a "fiction of command to the servant 'implied' from the employment itself." *Id.* Today, *respondeat superior* doctrine provides for a "deliberate allocation of risk." *Id.* However, this doctrine cannot be viewed in a vacuum; the fundamental agency law principle still pertains: "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219 (2010). Thus, *respondeat superior* analysis must focus not on the agent, but on the principal-agent relationship and the scope of employment.

B. *Respondeat Superior* Jurisprudence Before the Civil War.

This Court has always imputed knowledge of the wrongful actions of an agent to the principal. *See The Hiram*, 14 U.S. 440, 444 (1816) ("The claimants are affected with knowledge, by the knowledge of their agents . . . it is superfluous to discuss the question of law, the facts are so clear."); *see also The Eleanor*, 15 U.S. 345, 354 (1817) (holding the

"innocence of the intention alone" will not release an agent from binding the principal under the theory of *respondeat superior*).

This jurisprudence was well settled and followed by most courts prior to the enactment of § 1983. Consider for example *Thayer v. Boston,* 36 Mass. 511, 516-517 (1837), where the Massachusetts high court stated: "That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned."

Extending beyond the original colonies, this jurisprudence was also followed by later-added states, including those adopting the Napoleonic Code. *See, e.g., Allen v. City of Decatur,* 23 Ill. 332, 335 (1860) ("Governmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued."); *Johnson v. Municipality No. One,* 5 La. Ann. 100 (1850) ("The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned.")

C. *Respondeat Superior* and the Civil Rights Act of 1871.

Wrongful acts of law enforcement provide one notable historical source for *respondeat superior* liability. *See Hawks v. Charlemont,* 107 Mass. 414, 417-418 (1871) ("When officers of a town, acting as its agents, do a tortious act with an honest view to

obtain for the public some lawful benefit or advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done."). Such liability decisions were, in some ways, memorialized in the Civil Rights Act (CRA) of 1871 (later codified as amended, 42 U.S.C. § 1983), due to concerns about government agents' misconduct under color of law.

Concerned about the constitutionality of the Civil Rights Act (CRA) of 1866, Congress ratified the Fourteenth Amendment in 1868.[5] In 1870, two years later, the Fifteenth Amendment was ratified. These amendments did not end the increased violence occurring primarily in the South against the newly freed slaves and their supporters.[6] The CRA of 1871 (now 42 U.S.C. § 1983), also known as the

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[5] *See, e.g,* Ronald D. Rotunda *et al., Treatise On Constitutional Law: Substance And Procedure,* §§ 19.1-19.39 (1986); Alexander M. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1, 11-56 (1955); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949); John P. Frank & Robert F. Munro, *The Original Understanding of 'Equal Protection of the Laws',* 50 COLUM. L. REV. 131 (1950); Howard J. Graham, *Our 'Declaratory' Fourteenth Amendment,* 7 STAN. L. REV. 3 (1954); Eugene Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323 (1952); Will Maslow and Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality 1862-1952,* 20 U. CHI. L. REV. 363 (1953).

[6] *See Monell v. Department of Social Services,* 436 U.S. 658, 665-89 (1978); *Monroe v. Pape,* 365 U.S. 167, 172-84 (1961).

Ku Klux Klan Act of 1871,[7] was enacted by Congress at a time when newly freed slaves and their supporters were falling victim to increasing violence that went unpunished by state governments and their actors.[8]

In the post-Civil War period, victims faced a daunting task in bringing a complaint in Federal Courts based on tortious actions by the states' agents or officers.[9] In the 1871 CRA, legislators crafted new protection for civil rights plaintiffs. Section 1983 thus embodies Congress' effort to remove barriers and quell fears that legislative powers were inadequate to address the violence under existing laws.[10]

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[7] *See* Steven Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C.L. REV. 693, 698 (1993).

[8] *See* Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 547 (1989) (discussing history behind enactment of Civil Rights Act).

[9] *See* Gerhardt, *supra* note 4, at 547 (discussing problems with bringing actions against states under Fourteenth Amendment).

[10] *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961) (discussing legislative history of section 1983). Justice Douglas, writing for the majority, described a letter sent to Congress in 1871 from President Grant. This message read:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that

As discussed above, at the time the 1871 CRA was enacted, the doctrine of *respondeat superior* was well recognized in the common law of the United States and England. *See Monell,* 436 U.S. at 683-86. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions.[11] Given this settled doctrine, it is fair to assume the 1871 Civil Rights Act's authors recognized and intended for *respondeat superior* to apply to "a species of tort liability that on its face admits of no immunities." *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

Justice Stevens, in his *Tuttle* dissent, examined in-depth this legislative intent and judicial framework, and observed that tortfeasors as agents of a municipality should *not* enjoy any special protections in this Court's analysis:

> Indeed, we have repeatedly held that 42 U.S.C. § 1983 should be construed to incorporate common-law doctrine absent specific provisions to the contrary. . . .In the

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> the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

[11] In *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526, the Exchequer Chamber held that the owner of an omnibus company could be liable for injury inflicted on a rival omnibus company by a driver who violated the defendant's specific instructions.

> Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. [ ] One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

Id. at 838 (internal quotations and citations omitted) (the portion of the quoted passage after the ellipses is contained at *id.* n.12).

In the same the year the Ku Klux Klan Act was passed, the influential Massachusetts court reiterated that when municipal officers commit "a tortious act," even if the motive is laudable, the municipal entity "should be liable to make good the damage sustained." *Hawks,* 107 Mass. at 417-418. Undisputedly the post-Civil War courts recognized that *respondeat superior* applied to local governments and their agents.

D. The Civil Rights Act of 1871 and the Fourteenth Amendment

In the CRA of 1871, Congress created a federal remedy against a person who, acting under "color of state law," deprives another of constitutional rights. The statute defines a species of tort liability for any tortfeasor who acts under color of law to violate civil

rights, certainly including an attorney operating in a prosecutorial position as an agent conducting a core government function on behalf of the principal.[12] However, this Court has found that public officials may enjoy immunity from liability under various circumstances. *See Imbler v. Pachtman,* 424 U.S. 409, 417 (1976) (absolute immunity of public official under Civil Rights Act of 1871 defeats suit at outset, so long as official's actions were within scope of immunity; qualified immunity of official will turn on circumstances and motivations of his actions, as established at trial).

The CRA of 1871 (now § 1983) broadly defines the class of potential defendant by using the phrase "every person." It is well settled that "person" encompasses municipal corporations.[13] Moreover, the historical context of § 1983 demands that it be read in conjunction with the Fourteenth Amendment, which preceded this legislation by a mere two years. Some sixty years later this Court noted: "Since . . . the *Civil Rights Cases,* 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is

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[12] In *Pachtman*, Justice White, in a concurring opinion joined by Justices Brennan and Marshall, expressed grave concern over the ramification of any blanket immunity for a prosecutor in light of *Brady v. Maryland,* 373 U.S. 83 (1963). *See Pachtman,* 424 U.S. at 441, 446 n.9 (White, J., concurring).

[13] *Monell,* 436 U.S. at 687. Municipal corporations were routinely sued in the federal courts, and this fact was well known to Members of the 42nd Congress. *See, e.g., Louisville, C. & C.R. Co. v. Letson,* 43 U.S. 497, 558 (1844); *see also Cowles v. Mercer County,* 74 U.S. 118, 121 (1869).

only such action as may fairly be said to be that of the States."[14] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Accordingly, the Fourteenth Amendment applied to the states, and Section 1983 extended its application to the municipalities.

Congress has power to pass laws for regulating a subject in every detail, and the conduct and transactions of individuals in respect thereto (1) where Congress is clothed with direct and plenary power over a whole subject, and (2) where that power is accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations and among the several states. *See Civil Rights Cases*, 109 U.S. at 18. Accordingly, § 1983 does not authorize any recovery against an individual officer unless he has acted under color of official authority. But if the employer-employee relationship makes it appropriate to treat the officer's conduct as state action for purposes of constitutional analysis, then the relationship equally justifies the application of normal principles of tort law that would allocate responsibility for the wrongful state action. *Tuttle*, 471 U.S. at 840 (Stevens, J., dissenting).

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[14] The Fourteenth Amendment was not intended to protect individual rights against individual invasion, but to nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States." *See Civil Rights Cases, supra.* Accordingly, Congress has no authority to create a code of municipal law for the regulation of private rights, as the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *U.S. v. Morrison*, 529 U.S. 598, 621 (2000) (*citing Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

The holding in *Pembaur v. City of Cincinnati, supra*, confirms this notion. In *Pembaur*, the Court held that a "single incident" could constitute a violation of the statute. *Pembaur*, 475 U.S. at 480.

Historically, a municipality or other unit of local government had no immunity, neither qualified nor absolute. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 638 (1980) (no tradition of local government immunity); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 n.6 (9th Cir. 2001) (same); *see Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) (no immunity under § 1983); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1153 (2d Cir. 1995) (same). Unlike states, local governments do not have the protection of sovereign immunity. *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 382 (1990). Local governments are liable under Section 1983 for policies, formal or informal, that cause constitutional torts. *See e.g., DeGenova v. Sheriff of DuPage County*, 18 F. Supp. 2d 848, 849-850 (N.D. Ill. 1998), *aff'd*, 209 F.3d 973 (7th Cir. 2000).

There is certainly no constitutional impediment to municipal liability. "The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken v. Bradley*, 433 U.S. 267, 291 (1977); *see Ex parte Virginia*, 100 U.S. 339, 347-348 (1879) (same).

In overruling the municipal immunity holding of *Monroe v Pape*, 365 U.S. 167 (1961), the *Monell* Court held that local government units are "persons"

able to be sued under § 1983. In *Monell*, however, the Court addressed what eventually was found to be an unconstitutional, officially adopted, formal municipal policy. Thus *Monell* addressed only that factual situation, not all situations of municipal agents violating civil rights.

The language of § 1983 expressly imposes liability on any person who, under color of state law, "shall subject or cause to be subjected" another to deprivation of federally guaranteed rights, "plainly imposed liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *See Monell,* 436 U.S. at 692 (citation omitted). Significantly, the *Monell* Court initially noted that an analysis of the legislative history of the statute revealed *no congressional intention to insulate local government units from liability. Id.* at 689-690.

E. The Sherman Amendment.

Unfortunately, the *Monell* Court concluded that a local government may not be sued under § 1983 solely on a *respondeat superior* theory. Rather, the Court opined, it could be held liable only when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury for which the government as an entity is responsible under § 1983. *Id.* at 695. In doing so, the *Monell* Court based much of its analysis upon the defeat of the Sherman Amendment during the Congressional debate over the Civil Rights Act of 1871, which would have

imposed liability on local governments for failing to protect citizens from unlawful acts of *citizens*. *Monell*, 436 U.S. at 692-694.

That legislative history should have been deemed irrelevant. Congress rejected the Sherman Act, which would have imposed governmental liability for the acts of lynch mobs or roving bands of Klansmen. That rejection had nothing to do with *governmental* liability for the tortious acts of a prosecuting attorney litigating on behalf of the governmental entity.

As Justice Stevens later pointed out, the Sherman Amendment would have been "an extraordinary and novel form of absolute liability on municipalities." *Tuttle*, 471 U.S. at 839 (Stevens, J., dissenting). Moreover, imposing liability on governments for actions of private citizens would have made little sense because "the Fourteenth Amendment does not have any application to purely private conduct." The Fourteenth Amendment cannot be violated by an individual unless he is a government agent whose "relationship with his employer makes it appropriate to treat his conduct as state action for purposes of constitutional analysis." *Id.*

The doctrine of *respondeat superior* was well established as a remedy against municipalities by the time of § 1983's enactment, and the statute's legislative history does not reject the doctrine. Therefore, the statutory text of § 1983 should be read as encompassing this important common law doctrine.

CONCLUSION

This Court should rule that Parish is liable on the basis of *respondeat superior* without any consideration of official policy. Such a ruling would eliminate the convoluted analysis of deliberate indifference and the adequacy of employee training.

Respectfully submitted,

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August 13, 20[illegible]

AMICUS CURIAE BRIEF

No. 09-571

IN THE

Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. The ACLU of Louisiana is a state affiliate of the National ACLU. Since its founding in 1920, the protection of due process rights and the vindication of constitutional rights more generally have been the central concern of the ACLU, which has appeared before this Court in numerous cases implicating those rights and the fairness of the criminal justice system, both as direct counsel and as amicus curiae.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to seeking justice for the most vulnerable members of society. Although SPLC's work is concentrated in the South, its attorneys appear in courts throughout the United States to advocate for the enforcement of civil rights under federal and state law.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

Proper resolution of the legal issues raised by this case is therefore a matter of substantial concern to both organizations.

INTRODUCTION

The respondent in this case, John Thompson, suffered a shocking and grievous constitutional injury. Because multiple prosecutors in the Orleans Parish District Attorney's Office withheld exculpatory evidence in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963), Thompson was convicted and incarcerated for eighteen years, fourteen of which were on death row. Pet. App. 9a-10a, 59a. When these *Brady* violations became known, Thompson was subsequently retried and acquitted. He then filed this suit against the District Attorney and other senior officials in their official capacity and the office itself under 42 U.S.C. § 1983. A Louisiana jury found that Thompson's constitutional rights were violated because the office failed to provide adequate training to its prosecutors. *Id.* at 62a-64a.

The question presented before this Court is whether a jury may ever conclude that a single *Brady* violation may reflect a municipality's deliberate indifference to the need to provide adequate training. Pet. Br. i. In the course of urging this Court to answer that question in the negative, petitioners suggest that a municipal prosecutor's office may never be held accountable for the actions of its prosecutors, except in apparently limited or narrow circumstances that petitioners fail to

delineate. Pet. Br. 19, 24-25, 27, 29-31. Petitioners also argue that a municipal prosecutor's office cannot be deliberately indifferent to the need to provide adequate training in the safeguard of constitutional rights, including *Brady* obligations, because prosecutors graduated from law school and are required by codes of ethics to keep pace with current law. Pet. Br. 25, 27, 30, 37.

Even were those issues properly before this Court, petitioners' contentions are fundamentally unsound. There is no basis to carve out from Section 1983 certain types of municipal bodies (*i.e.*, the office of the prosecutor), certain types of employees (*i.e.*, attorneys), or the types of constitutional violations that may form the basis for liability based on inadequate training (*Brady* violations). And as to the actual question presented, a jury could certainly conclude from a single *Brady* violation that a municipal prosecutor's office was deliberately indifferent to the need for adequate training. The need for *Brady* training is glaringly obvious and there is an exceedingly high risk that constitutional harm will result if prosecutors do not receive adequate training. Thus, particularly when a *Brady* violation results from the collective failure of multiple prosecutors to comply with their *Brady* obligations, a jury properly may find that a municipal prosecutor's office acted with deliberate indifference to the need to safeguard a suspect's rights.

SUMMARY OF ARGUMENT

I. Under this Court's established Section 1983 jurisprudence, a municipal body is liable under Section 1983 if a constitutional violation is the direct result of its deliberate indifference to the need to provide its employees adequate training. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407 (1997). This Court has also held that the qualified immunity conferred on individual public employees does not extend to their municipal employers. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Thus, a municipal prosecutor's office, like any other municipal body, is liable if a plaintiff shows that a prosecutor violated his constitutional rights based on inadequate training or supervision and the municipal prosecutor's office acted with deliberate indifference to the need to provide adequate training and supervision.

This Court accordingly should reject petitioners' request to extend to a municipal prosecutor's office the absolute immunity conferred on individual prosecutors. "The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52. Moreover, "owing to the . . . immunity enjoyed by [individual prosecutors], many victims of municipal malfeasance would be left remediless," *id.* at 651 (internal citation omitted), if the municipality

were not held accountable for injury traceable to its actions or inactions. That result would clearly render Section 1983 an ineffective tool to deter and redress violations of constitutional rights.

This Court should also reject petitioners' invitation to create a special rule of liability for municipal prosecutor's offices. A prosecutor's status as a professional provides no justification for absolving the local government that employs him from the government's own independent duty to comply with the Constitution.

That conclusion is particularly warranted in the *Brady* context. The office of the prosecutor has a special responsibility in our criminal justice system to preserve the truth-seeking function of the criminal trial and to avoid a grave miscarriage of justice. An individual prosecutor thus acts not to advance his or her own interests or to seek a conviction. He rather acts as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

This Court's precedents provide no basis for relieving a municipal prosecutor's office from liability where the office's failure to provide an individual prosecutor with adequate training is the direct cause of a *Brady* violation. Innocent victims would have no remedy whatsoever, even if they are injured as a direct result of an office's failure to provide adequate training. *Brady* violations are

inherently difficult or impossible to detect, and Section 1983 liability is critical to providing a remedy when the violation results in a wrongful conviction and incarceration, and to deterring a prosecutor's office from ignoring its independent duty to comply with the Constitution.

Moreover, a *Brady* violation will frequently result from the collective failure of multiple prosecutors to follow the law based on an office's custom of non-compliance or based on the office's failure to provide adequate training. This case well illustrates the point. The jury heard extensive evidence that at least four prosecutors knew about the exculpatory evidence, and none of them disclosed it to Mr. Thompson. A jury could readily conclude that such collective inaction demonstrated a systemic breakdown by the office in *Brady* compliance.

II. This Court in *City of Canton* and *Bryan County* left open the possibility that a jury could conclude from evidence of a single constitutional violation that the violation was caused by a municipality's deliberate indifference to the need for adequate training. Those decisions explained that a finding of deliberate indifference could be justified in certain recurring situations, like an officer's use of deadly force, where the need for training was obvious and the likelihood was high that a government official lacking adequate training will violate a citizen's constitutional rights. *City of Canton*, 489 U.S. at 390 n.10; *Bryan County*, 520 U.S. at 409.

A *Brady* violation comfortably fits within that scenario. A *Brady* violation often results in calamitous consequences, as this case demonstrates. If a prosecutor is not adequately trained with the skills to comply with *Brady*, the risk is exceedingly high that the prosecutor will commit a serious constitutional violation. A jury thus could well be justified in finding that, even absent a pattern of *Brady* violations, a violation was caused by the deliberate indifference of a municipal prosecutor's office to the need to provide adequate training to prosecutors.

The above conclusion does not eviscerate the requirement that the plaintiff must prove causation or the requisite deliberate indifference on the part of a District Attorney's office. This case illustrates that there may be ample evidence from which a jury could conclude that an office did not provide adequate training in *Brady* compliance. *See* Pet. App. 46a-48a, 72a-80a. A jury therefore would be entitled to conclude that the lack of training caused a *Brady* violation and that, given the obvious need to train and the high risk of constitutional error absent adequate training, the District Attorney's office acted with deliberate indifference.

ARGUMENT

I. A MUNICIPAL PROSECUTOR'S OFFICE IS SUBJECT TO SECTION 1983 LIABILITY FOR *BRADY* VIOLATIONS CAUSED BY ITS DELIBERATE INDIFFERENCE TO THE NEED TO PROVIDE ADEQUATE TRAINING

In *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-92 (1978), this Court held that municipalities and other local government bodies are "persons" subject to liability under 42 U.S.C. § 1983 for causing the violation of a plaintiff's constitutional rights by virtue of a municipal policy or custom. And in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), and *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407 (1997), the Court held that a municipal body may be liable under Section 1983 if a constitutional violation is caused by the municipality's deliberate indifference to the need to provide adequate training to its employees.

This Court has never distinguished among types of municipal entities for purposes of Section 1983 liability. *See generally Monell*, 436 U.S. at 658; *Owen v. City of Independence*, 445 U.S. 622 (1980). Indeed, Section 1983's "language is absolute and unqualified." *Owen*, 445 U.S. at 635. Moreover, "there is no tradition of immunity for municipal corporations" that might give rise to distinctions among types of municipal bodies. *Id.* at 638. Thus, a municipal prosecutor's office—like any other

municipal body—is liable under Section 1983 if it causes a constitutional violation as a result of the office's deliberate indifference to the need to provide adequate training to individual prosecutors. *City of Canton*, 489 U.S. at 388; *Bryan County*, 520 U.S. at 407.

The above conclusion results from a straightforward application of settled law. Petitioners nonetheless suggest (Pet. Br. at 19, 24-25, 27, 29-31, 37-39) that a municipal prosecutor's office should not be subject to the same rules applicable to all other municipal offices, and thus should not be held liable for failure to provide adequate training. That result—which would extend the absolute immunity enjoyed by individual prosecutors to the municipalities that employ them—is contrary to this Court's precedents and the remedial purpose of Section 1983.

A. Section 1983 Does Not Provide a Basis for Treating a District Attorney's Office Differently From Other Municipal Bodies

1. This Court has steadfastly refused to carve out special exceptions to Section 1983 liability for municipal entities. Municipalities "have no immunity from damages liability flowing from their constitutional violations." *Owen*, 445 U.S. at 657; *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—

either absolute or qualified—under § 1983."). "[T]here is no tradition of immunity for municipal corporations" nor any policy reason to extend immunity to municipal entities. *Owen*, 445 U.S. at 638. For those reasons, *Owen* rejected the notion that the qualified immunity under § 1983 for *individuals* who do not violate clearly established constitutional rights should extend to *municipalities*. *Id.* at 657.

The reasoning underlying the Court's decision in *Owen* compels the rejection of petitioners' suggestion that municipal prosecutor's offices—alone and distinct from all other municipal bodies—should be exempt from liability if a constitutional violation is caused by the failure to provide prosecutors with adequate training. That result would improperly extend to municipalities the absolute immunity conferred on individual prosecutors. Petitioners do not point to any common-law tradition of absolute immunity for some types of municipalities but not others. *Compare Owen*, 445 U.S. at 650. Similarly, as in *Owen*, it is fairer to require the public at large, which reaps the benefits of the services performed by the prosecutor's office, to bear the costs of the office's activities than to impose the loss flowing from a constitutional violation solely on the victim of that violation. *Id.* at 654-55, 657.

And as in *Owen*, treating the office of the prosecutor like all other municipal bodies provides an important incentive for compliance with constitutional obligations. Unlike personal liability, which may distort the judgment of prosecutors and

distract them from their duties, the Court has explained that municipal liability has largely positive effects. *Owen*, 445 U.S. at 655-56. "[C]onsideration of the ***municipality's*** liability for constitutional violations is quite properly the concern of its elected or appointed officials," and "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Id.* at 656. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317-18 (2d Cir. 1999) (explaining that municipal liability "can encourage the municipality to reform the patterns and practices that led to constitutional violations").

2. It would also grossly frustrate the remedial purposes of Section 1983 if a prosecutor's office were exempt from the general rule that municipalities are liable for constitutional violations caused by deliberate indifference to the need to provide adequate training. No one would be accountable for constitutional violations caused by the failure of a municipal prosecutor's office to provide adequate training to prosecutors. Innocent citizens who have been wrongfully convicted and incarcerated would have no remedy even if the constitutional error resulted from the conscious decision by senior policymakers in the prosecutor's

office not to establish a policy in *Brady* compliance, not to train their lawyers regarding their *Brady* obligations, nor to supervise or otherwise monitor their attorneys regarding their obligations, or otherwise to ignore known constitutional violations.

In affirming the unqualified liability of municipalities under § 1983, *Owen* balanced the "costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity." 445 U.S. at 657. The Court explained that "a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Id.* at 651. By providing a cause of action against the municipality, "[t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury." *Id.* at 657.

Owen also recognized that immunized officials may go about their business "secure in the knowledge that . . . immunity will protect [them] from personal liability for damages." *Id.* "And the public will be forced to bear only the costs of injury inflicted by . . . acts . . . fairly said to represent official policy." *Id.*

All of those principles are relevant here. Relieving a District Attorney's office from any liability for constitutional violations caused by its failure to train—allowing them "to assume that attorneys will abide by the standards of the profession" and thus comply with the law, Pet. Br. at 31—upsets this balance and leaves no one to answer for even an egregious miscarriage of justice. Accepting petitioners' position would thus defeat a core purpose of Section 1983, which is to provide a damages remedy for a constitutional violation caused by a municipality's actions.

B. The *Brady* Context Makes It Particularly Appropriate to Hold a Municipal Prosecutor's Office Liable If It Causes a *Brady* Violation Through Its Deliberate Indifference to the Need to Provide Adequate Training

1. Absolving a municipal prosecutor's office of liability for a *Brady* violation is inconsistent with the unique duty of the prosecution to disclose material exculpatory evidence to the defense. *Brady* "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

The individual prosecutor accordingly does not act to further his individual interests or to secure a

conviction. Rather, the prosecutor acts as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see Strickler*, 527 U.S. at 281; *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (*Brady* is vital "to preserve the criminal trial . . . as the chosen forum for ascertaining the truth about criminal accusations"); *Bagley*, 473 U.S. at 675 (disclosure ensures that a "miscarriage of justice does not occur"); *United States v. Agurs*, 427 U.S. 97, 104 (1976) (non-disclosure involves a "corruption of the truth-seeking function of the trial process").

Accordingly, the prosecutor's office as a municipal sovereign bears full responsibility for a *Brady* violation. Thus, a defendant's conviction must be reversed upon non-disclosure of material evidence, even where *Brady* evidence is not known to the individual prosecutor on the case but is known to other prosecutors in the office. *Kyles*, 514 U.S. at 437-438; *Giglio v. United States*, 405 U.S. 150, 154 (1972).

To be sure, this Court has reserved the question whether the Constitution imposes a free-standing obligation on a prosecutor's office to establish policies and to provide adequate training to individual prosecutors. *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861 (2009); *see* Pet. App. 79a n.12 ("We do not hold as a matter of law that *Brady* training is always required. Our decision is based on the specific facts of this case that demonstrated that,

at least in the Orleans Parish DA's Office in 1985, *Brady* training was needed."). But where a constitutional violation ***has been proven*** to have resulted from an office's deliberate indifference to the need to provide adequate training, there is no basis for distinguishing a *Brady* violation from the other types of violations that may form the basis of a failure-to-train claim.

To the contrary, placing liability on the office for harm it directly causes is proper when the sovereign itself—not an individual prosecutor—is the party responsible for preserving the integrity and truth-seeking function of the criminal trial. To accept petitioners' premise not only would absolve the government of any liability whatsoever for *Brady* violations; it also would gut significant incentives for a municipal prosecutor's office to establish clear policies and provide adequate training and supervision to individual prosecutors.

2. Two other features of a *Brady* violation reinforce the need to hold a municipality accountable when its deliberate action causes harms. First, the withholding of evidence, by its nature, is extremely difficult or impossible to detect, and *Brady* violations often remain undetected for many years after a conviction. The inherent difficulties in discovering a *Brady* violation also can result in calamitous consequences, including subjecting innocent or wrongfully convicted citizens to protracted periods of incarceration. *See, e.g.*, Pet. App. 9a-10a (18 years of incarceration, 14 years on death row); *Van de Kamp*, 129 S. Ct. at 859 (24 years of incarceration); *Walker*

v. City of New York, 974 F.2d 293, 294 (2d Cir. 1992) (19 years of incarceration). Accordingly, in the rare instance when a violation *is* detected, holding the municipal body accountable for its actions is essential to deter unconstitutional conduct.

Second, *Brady* violations will frequently represent *collective failures* by a prosecutor's office, and accordingly, liability is appropriately placed on the office when a violation is caused by its deliberate indifference to the need to provide adequate training. In almost any conceivable criminal case involving the handling and withholding of exculpatory evidence by a prosecutor, more than one individual within the prosecutor's office and the police department will be aware of (a) the evidence, (b) the exculpatory potential of the evidence, and (c) the need to disclose the evidence to the defense.

This case well illustrates the point. At least four separate prosecutors (the line prosecutors, James Williams and Gerry Deegan, the screening prosecutor Bruce Whittaker, and the supervising prosecutor Eric Dubelier) knew about the exculpatory blood evidence and not one of them acted to ensure its disclosure. Pet. App. 54a-56a. A fifth prosecutor (Michael Riehlmann) learned of the intentional concealment of exculpatory evidence following the trial and also did nothing. *Id.* at 58a. A collective failure to adhere to a suspect's basic constitutional rights is highly likely to reflect a systemic breakdown in the safeguarding of constitutional rights that is properly attributable to the office itself. And it is the type of "'systemic'

injur[y] . . . result[ing] . . . from the interactive behavior of several government officials," that Section 1983 municipal liability is meant to deter. *Owen*, 445 U.S. at 652.

C. A Prosecutor's Status as a Professional Does Not Warrant Excepting a Municipal Prosecutor's Office From Section 1983 Liability

Petitioners argue that because a prosecutor is a professional, his employer cannot readily be deliberately indifferent to the need to provide him adequate training. Pet. Br. at 19, 27-31. Petitioners reason that prosecutors, "[s]imply to become attorneys . . . must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness standards," and they must comply with "continuing-education requirements" and the ethical standards of the profession. Pet. Br. 27-28; *accord* 38 ("By definition, a prosecutor is a licensed professional already equipped to assess what to do with potential *Brady* material."). *Brady*, however, is a fundamental precept of our criminal justice system, and has been the subject of extensive and evolving jurisprudence by this Court. *Infra*, pp. 21-22. It would be passing strange were this Court to hold that *Brady* compliance is the duty solely of individual prosecutors and not the sovereign on whose behalf those prosecutors act.

In any event, a lawyer's professional obligations are not duties that individual attorneys bear alone. Rather, state codes of professional

conduct uniformly impose special obligations upon *associations of lawyers* to monitor and train the attorneys they employ. ABA Model Rule 5.1, a requirement of practice broadly embraced by almost all United States jurisdictions, provides that:

> [a] partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

The rule further provides that an individual lawyer with supervisory authority over a particular subordinate attorney "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." *Id.* Holding legal employers responsible for the professional competence and integrity of their employees reflects a judgment that "the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules." Model Rules of Prof'l Conduct R. 5.1 cmt. (2010).

Accordingly, codes of professional conduct explicitly contemplate that associations of attorneys and supervising lawyers will play an active role to ensure that lawyers under their control meet their professional obligations. These obligations apply to

associations of prosecutors no less than other associations of attorneys. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 394 (2002) (noting that "most [state] professional codes barely distinguish between prosecutors and other lawyers," and "[n]one specifically exempt prosecutors from otherwise applicable rules").

Municipal prosecutor's offices, like any other organization of lawyers, have a responsibility to foster an atmosphere of ethical practice and adherence to law. Indeed, given the critical function that prosecutors play in administering constitutional rules of criminal procedure, municipal prosecutor's offices have special responsibilities to ensure that their professional employees understand and follow the law.

II. A SINGLE *BRADY* VIOLATION MAY FORM THE BASIS OF A FAILURE-TO-TRAIN CLAIM

A. This Court's Precedents Contemplate That a Single Constitutional Violation May Reflect a Municipality's Deliberate Indifference to the Need for Adequate Training

This Court in *City of Canton* left open the possibility that evidence of a single violation of constitutional rights may trigger municipal liability if the violation was traceable to the municipality's deliberate indifference to the need for adequate

training in the safeguard of constitutional rights. 489 U.S. at 390. The Court explained that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*; *Bryan County*, 520 U.S. at 409.

City of Canton provided the example of the "obvious" need to train police officers on the proper use of firearms issued to them:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S. at 390 n.10. In *Bryan County*, a case involving the use of excessive force during an arrest, this Court similarly explained that:

> [t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle

> that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.

520 U.S. at 409.

B. A *Brady* Violation Falls Within the Parameters Contemplated in *City of Canton* and *Bryan County*

A *Brady* violation comfortably fits the circumstances contemplated by this Court. Where a jury hears evidence that a *Brady* violation was directly caused by an individual prosecutor's lack of adequate training, the remaining questions for municipal liability under Section 1983 are whether his employer acted with the requisite deliberate indifference and whether the violation is directly linked to the employer's actions. Under the reasoning of *City of Canton* and *Bryan County*, a jury may infer deliberate indifference given the nature of the underlying *Brady* violation.

An individual prosecutor exercises enormous power and discretion to prosecute. The need for training in *Brady* compliance with respect to the full range of exculpatory evidence is obvious: *Brady* and its extensive progeny are hardly intuitive. Thus, while prosecutors may be presumed to be aware of a

duty to disclose "direct evidence that the accused was elsewhere at the time of the crime," training is obviously needed in "the intricacies of *Brady*." *Walker*, 974 F.2d at 300. *See, e.g.*, *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (*Brady* obligation does not apply post-conviction); *United States v. Ruiz*, 536 U.S. 622, 629-33 (2002) (*Brady* does not apply to plea agreements); *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Bagley*, 473 U.S. at 682 (defining materiality under *Brady*); *Giglio*, 405 U.S. at 154-155 (*Brady* includes impeachment evidence known by anyone within prosecutor's office).

Moreover, the prosecutor's office knows that a prosecutor's error in judgment in disclosing exculpatory evidence or applying this Court's *Brady* jurisprudence will frequently result in a constitutional violation. *Walker*, 974 F.2d at 300 ("[W]ithholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."). If a jury finds that a prosecutor's lack of training caused a *Brady* violation, under the reasoning of *City of Canton*, a jury could also properly find that the employer's failure to provide adequate training reflects the employer's deliberate indifference to the violation. *See Bryan County*, 520 U.S. at 409-10.

Petitioners thus err in asserting that injury from a *Brady* violation, absent a history of repeated

violations, can *never* be the result of deliberate indifference on the part of a municipality. Pet. Br. 19, 25-41. The Court in *Bryan County* recognized that "the risk [of constitutional injury] from a particular glaring omission in a training regimen" may be highly obvious. 520 U.S. at 410. Applying that principle here, a jury could readily find—and, indeed, did find—that the nature of a *Brady* violation "would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision [not to train] would be the deprivation of a third party's federally protected right" and thus find that the policymaker acted with "deliberate indifference." *Id.* at 411.

This Court similarly should reject petitioners' sweeping argument that "a lack of training" can almost never directly cause a *Brady* violation because "what actually causes a violation is the prosecutor's own lapse, not a district attorney's failure to train the prosecutor on what he was already equipped to know and do." Pet. Br. 19; *accord* 37. That unfounded assertion improperly assumes prosecutors whose actions violate the Constitution invariably act in bad faith, as opposed to mere negligence or simple ignorance (resulting from the lack of training) about the full scope of the *Brady* obligation.

There is thus no good reason for categorically foreclosing the jury from inferring from a single *Brady* violation that the violation was caused by the office's failure to provide adequate training and supervision. After all, there may be significant

evidence, like in this case, that the office was indifferent to the need for training in the intricacies of *Brady* and that had the prosecution team received adequate training, it would have complied with its constitutional obligations. That conclusion is particularly warranted if, as in this case, the violation results from the actions of multiple prosecutors. *Supra*, p. 16. A single violation in which multiple actors took part makes it exceedingly unlikely that the violation resulted from bad faith alone (much less bad faith from a single rogue prosecutor as petitioners contend, Pet. Br. 19). The more plausible explanation is that the office as a whole lacked clear policies or there was a systemic breakdown in training and monitoring by the office.

C. Holding Prosecutor's Offices Liable for Brady Violations Would Not Unreasonably Expose Prosecutor's Offices to Municipal Liability for Virtually Any Constitutional Violation

Petitioners argue that allowing a jury to infer deliberate indifference from a single *Brady* violation would extend *City of Canton* beyond *Brady* to a litany of other decisions by a prosecutor. Pet. Br. 35. That assertion, too, lacks merit.

1. As discussed, *Brady* violations are unique in that they are rarely discovered before or during trial. By contrast, defense counsel can inquire of their client, for example, about whether *Miranda* warnings were properly given or about the police conduct during a search, and defense counsel

can object to the prosecution's improper attempt to introduce evidence. Any proven violation of these issues thus can be remedied before or during the trial.

The existence of potentially exculpatory evidence, on the other hand, is known solely to the prosecution. Typically, defense counsel has no recourse beyond asking the prosecutor to determine whether the government has potentially exculpatory material or information. If the prosecutor fails to disclose the information, in all probability, it will never become known to the defense. Accordingly, *Brady* violations may never be detected without self-disclosure by the prosecution. *See supra*, pp. 15-16.

"It is all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface." *Imbler v. Pachtman*, 424 U.S. 409, 444 (1976) (White, J., concurring). And given the centrality of *Brady* to the special role of the prosecutor and the calamitous consequences that are likely to result from errors in judgment, the need for clear policies and adequate training is particularly obvious. A jury therefore could properly conclude that a single violation was the result of a municipality's deliberate indifference to the need for training.

Contrary to petitioners' assertions, Pet. Br. 39-40, the above principles do not permit a jury to conclude that a police officer's rape of a detainee was caused by a municipality's inadequate sexual

harassment policy. The nature of rape, of course, is that the perpetrator intended to commit violence. By contrast, a *Brady* violation, just like an officer's improper use of deadly force, may result either from an individual's misconduct *or* errors in judgment due to lack of adequate training. *But cf.* Pet. Br. 54 ("The evidence may have permitted, at most, the inference that there were four bad apples in Connick's office instead of one."). As long as the facts support either inference, the jury is entitled to choose which scenario it believes is more plausible.

2. Contrary to petitioners' alarmist argument that affirming the decision below would have "particularly ruinous implications for prosecutorial offices," Pet. Br. 36, the lower courts have been cautious in applying *City of Canton* to the circumstances indentified by this Court.

For example, "a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events." *Walker*, 974 F.2d at 297. Several courts thus have dismissed claims because the need for training was deemed not obvious.

In *Beard v. Whitmore Lake School District*, 244 F. App'x 607 (6th Cir. 2007), the court dismissed a Section 1983 suit by high school students against the school district for the actions of teachers who had subjected the students to strip searches. *Id.* at 607-08. Although the school district had a policy on student searches, the plaintiff had complained that the school district should have provided training

beyond making the policies publicly available. *Id.* at 610. Contrasting the case with the circumstances in *City of Canton*, the court reasoned that it was not "obvious" that the school district needed to provide additional training to avoid violations by teachers of the students' Fourth Amendment rights. *Id.* at 611. Here, however, the jury properly concluded that the need for *Brady* training was obvious. Pet. App. 62a-64a.

Similarly in *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006), the court dismissed an elementary school student's Section 1983 suit against a county sheriff in his official capacity after a deputy sheriff, serving as a school resource officer, had detained and handcuffed the student. The student asserted that the deputy received no training on how to detain students. *Id.* at 1308. Reasoning that the need for specific training on detaining students is not as obvious as the *City of Canton* example, the Eleventh Circuit held that the sheriff was entitled to summary judgment because the failure to provide the specific training at issue was not so likely to result in the violation of Fourth Amendment rights that the sheriff could be said to have been deliberately indifferent. *Id.* at 1309. By contrast, as explained above, the need to train prosecutors is as obvious as the need for training police on the use of firearms.

In *Zhao v. City of New York*, 656 F. Supp. 2d 375 (S.D.N.Y. 2009), the plaintiff challenged a police training manual that instructed police, before asking if a suspect is willing to waive *Miranda* rights, to tell the suspect that if he does not agree to talk "[he]

won't get to tell [his] side of the story." *Id.* at 393. In rejecting that claim, the court noted that to meet the "demanding" standard set forth in *City of Canton*, a plaintiff must show, *inter alia*, that an error in judgment by the police will frequently violate the suspect's constitutional rights. *Id.* The court accordingly held that the plaintiff failed to prove that suspects would frequently waive their right to silence based on the statement in the training manual. *Id.* at 393-94. Again by contrast, a failure to train prosecutors on how to comply with *Brady* and its progeny is overwhelmingly likely to result frequently in the violation of *Brady*.

In *Buchanan v. Maine*, 417 F. Supp. 2d 45 (D. Me. 2006), the court dismissed the claim of a mentally ill person killed by county sheriff deputies during a warrantless entry into his home. The court rejected the notion that the county's failure to adequately train its officers in dealing with mentally ill persons was the cause of the plaintiff's injury. *Id.* at 65-66. The district court reasoned the plaintiff provided "no evidence that when [the deputies] were hired there was a need for increased training in proper methods for . . . engaging mentally ill and potentially combative persons." *Id.* at 66. Again, in this case, the jury heard more than ample evidence to find that the need for additional training was obvious. Resp. Br. 37-44.

Moreover, there is no liability if the failure to provide adequate training was not the direct cause of the constitutional violation. Thus, in *Causey v. City of Bay City*, 353 F. Supp. 2d 864, 867 (E.D. Mich.

2005), *rev'd on other grounds*, 442 F.3d 524 (6th Cir. 2006), the court dismissed a complaint alleging that a city failed to train its officers adequately in proper entry and searches of "personal residences." The court relied on extensive evidence that the officers received regular training on searches and seizures. *Id.* at 876. The court also concluded that "the mere fact that these officers could have been better trained, or more prepared for *this particular incident* . . . does not establish deliberate indifference toward training" by the city. *Id.* (emphasis added). Here, by contrast, there was ample evidence of inadequate training and that a systemic breakdown in training by multiple prosecutors caused the violation that occurred in this case.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-571

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney, *et al.*,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICI CURIAE BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW; THE CRIMINAL JUSTICE INSTITUTE, UNIVERSITY OF HOUSTON LAW CENTER; THE JACOB BURNS CENTER FOR ETHICS IN THE PRACTICE OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW; THE LOUIS STEIN CENTER FOR LAW AND ETHICS, FORDHAM UNIVERSITY SCHOOL OF LAW; AND THE STANFORD CRIMINAL JUSTICE CENTER, STANFORD LAW SCHOOL IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are several centers based at leading law schools committed to the study of criminal law and procedure, the institutional administration of criminal justice, and legal ethics. They share the mission of promoting best practices in the operation of prosecutors' offices and the criminal justice system more broadly through academic research, litigation, and participation in the formulation of public policy. Many of *amici's* directors and faculty advisors amassed significant experience as federal and state prosecutors before entering academia, while others served as defense attorneys or with private organizations involved in criminal cases. Several are now academic leaders in the scholarship and teaching of criminal law and procedure and legal ethics.

Petitioners contend that liability under 42 U.S.C. § 1983 cannot arise from the failure to train prosecutors because they are already sufficiently equipped to avoid constitutional violations by law school and passage of a bar exam, and are effectively policed by professional disciplinary authorities. *Amici* – who know firsthand the inevitably superficial level of understanding of the doctrine first enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), that is transmitted in law school – strongly disagree that

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

these are adequate safeguards. They are concerned that acceptance of Petitioners' position could result in prosecutors cutting *Brady*-related training at a time when, ironically, wide consensus has developed as to its necessity. Accordingly, *amici* submit this brief in support of Respondents in order to promote ongoing and effective training of prosecutors as an invaluable mechanism for ensuring both effective law enforcement and the protection of constitutional rights.

SUMMARY OF ARGUMENT

This Court has held "that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability" under § 1983. *Bd. of County Comm'rs. of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997); *see also City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

Petitioners argue that an office of prosecutors cannot be held liable under this theory unless there is a pattern of previous violations because prosecutors are already armed against error and wrongdoing by virtue of having graduated from law school, passed a bar exam, and taken up positions as licensed professionals. In light of these attributes, Petitioners assert, no one could foresee that prosecutors would be likely to violate constitutional rights, and without such predictability there can be no finding of deliberate indifference or liability under § 1983.

In fact, it is entirely predictable that *Brady* violations will occur if prosecutors are not given

effective training. The recurrence of mistakes and deliberate violations by prosecutors when they handle *Brady* material, documented repeatedly across decades, confirms that prosecutors need training. Complying with *Brady* often presents complex legal problems that can easily lead to error, and making the right decision is even harder in light of the institutional pressures prosecutors face to win their cases. Neither courses in criminal law and professional responsibility nor study for the bar exam imparts sufficient knowledge about *Brady*'s doctrinal complexities or ethical demands. Nor is the prospect of discipline from state bar authorities a serious deterrent in light of how rarely prosecutorial misconduct is investigated, much less sanctioned. Petitioners and their *amici* are therefore wrong to claim that chief prosecutors can reasonably rely on their subordinates' status as professionals to prevent constitutional violations. *See* Points I and II, *infra*.

Petitioners' view that training is unnecessary and cannot prevent *Brady* violations is equally misguided. There is wide acceptance of the essential need to conduct ongoing education of prosecutors in the law and ethics of subjects like *Brady* compliance, and the Department of Justice and most state offices now employ such training. Petitioners' argument contradicts this long-term trend and, if accepted, threatens to set government back in adopting the very practices needed to prevent more tragedies like the one that befell Thompson. *See* Point III, *infra*.

Justice Jackson, then Attorney General, famously observed that the prosecutor "has more control over life, liberty and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*,

24 J. AM. JUDICATURE SOC'Y 18, 18 (1940). In light of this tremendous power, it is wrong to simply assume that a law degree and a license and nothing more properly equip prosecutors to make the right decisions. Continuing, effective training is imperative to protect constitutional rights.

ARGUMENT

I. *Brady* Violations Are Predictable in the Absence of Ongoing, Effective Training

A. Prosecutors Have Consistently Struggled with *Brady's* Requirements

The clearest indication that there is an obvious need to train prosecutors in the law and ethics of *Brady* compliance is the substantial accumulated evidence that prosecutors fail at the task at a consistent and significant rate. Many violations are never uncovered, making it impossible to get more than a glimpse of the true scope of the problem. But enough instances of unlawful suppression have surfaced over the years to cast doubt on Petitioner's claim that any lawyer with a diploma and a passing grade on the bar exam is ready to fulfill a prosecutor's constitutional disclosure obligations.

Several studies of particular groups of cases have found recurring *Brady* violations. One review of all capital convictions in the United States from 1973-1995 found that illegal suppression of evidence accounted for 16% of all state post-conviction reversals – the second most common cause. *See* James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases,*

1973-1995, 78 TEX. L. REV. 1839, 1850 (2000). The *Chicago Tribune* reviewed records of cases involving prosecutorial misconduct throughout the country and found 381 homicide cases, 67 of them capital, in which convictions were reversed because the government concealed exculpatory evidence or used evidence known to be false. *See* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1, *available at* www.chicagotribune .com/news/watchdog/chi-020103trial1,0,479347.story. The *Pittsburgh Post-Gazette* reviewed 1,500 allegations of prosecutorial misconduct in the preceding ten years and "found hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect." Bill Moushey, *Win at all Costs, Hiding the Facts*, PITT. POST-GAZETTE, Nov. 24, 1998 at A1.

The New York State Bar Association's Task Force on Wrongful Convictions closely examined 53 cases of reversed convictions in that state and determined that violation of *Brady* was one of the factors potentially responsible for the erroneous results. *See* N.Y. STATE BAR ASS'N, FINAL REPORT OF THE N.Y. STATE BAR ASS'N'S TASK FORCE ON WRONGFUL CONVICTIONS 19 (2009), www.nysba.org/AM/Template.cfm?Section= Blogs1&Template=/CM/ContentDisplay.cfm&Conten tID=27188 (hereafter "N.Y. REPORT"). The task force also cited thirteen other published New York decisions featuring *Brady* violations. *See id.* at 26. In North Carolina, the easing of post-trial access to prosecutors' files in 1996 led to the reversal of ten death sentences for *Brady* violations. *See* Robert Mosteller, *Exculpatory Evidence, Ethics and the Road to the Disbarment of*

Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257, 261 (2008).

There have also been several individual, highly publicized cases of *Brady* violations in recent years. Perhaps most notable was the Department of Justice's admission that *Brady* violations so tainted the trial of Senator Ted Stevens that post-conviction dismissal was required. *See* Mike Scarcella, *Sen. Stevens Trial Suspended Over Possible* Brady *Violation*, LEGAL TIMES, Oct. 2, 2008 at 1. The government's prosecution of W.R. Grace executives for asbestos poisoning in Libby, Montana was derailed by *Brady* violations, leading the judge to harshly criticize prosecutors. *See* Kirk Johnson, *Judge Says Asbestos Case Can Proceed*, N.Y. TIMES, April 28, 2009 at A17. The prosecution of Duke University lacrosse players for sexual assault collapsed upon the revelation that the prosecutor withheld exculpatory DNA test results. *See* Shaila Dewan, *Duke Prosecutor Jailed: Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007 at A8. Widely reported convictions of two executives in New York for antitrust violations were later overturned due to the state Attorney General's failure to produce potentially exculpatory documents. *See* Noeleen G. Walder, *Former Executives' Convictions Upset Over AG's Failure to Turn Over Documents to Defense*, N.Y. L.J., July 9, 2010 at 1. A federal case against two men accused of forming a "terrorist sleeper cell" in Detroit was dismissed because the government withheld favorable evidence. *See* John Farmer, *Prosecutors Gone Wild*, N.Y. TIMES, April 3, 2009, at A29.

Last year, the Chief Judge of the District of Massachusetts noted the government's "long pattern of inadvertent failures to produce material exculpatory

information, and cases of intentional misconduct as well" in that district, observed that violations there continued despite repeated admonitions by the courts, and considered sanctioning the United States Attorney. *United States v. Jones*, 620 F. Supp. 2d 163, 168-85 (D. Mass. 2009). The court cited a 2007 report by the Advisory Committee on Criminal Rules noting the "significant number of cases in which the courts have found *Brady* violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed" though no due process violation resulted. *Id.* at 172. The court also appended a non-exhaustive list of 68 reported federal cases featuring *Brady* violations and failures to disclose exculpatory or impeachment evidence. *See id.* at 185-93, Ex. A.

Overall, one former prosecutor and leading scholar of prosecutorial ethics concludes that "[t]housands of decisions by federal and state courts have reviewed instances of serious *Brady* violations, and hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence." Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006); *accord* Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1938 (2008) ("disclosure violations continue to occur at high rates at both the federal and state levels").

While recent high profile cases of *Brady* error and misconduct like the Stevens trial post-date Thompson's prosecution, there is no reason to believe that *Brady* violations are more numerous now than they were in 1985. If anything, the additional quarter

century of judicial guidance about *Brady*'s requirements should have facilitated compliance. Many of the cases analyzed in the studies discussed above took place around the time of Thompson's prosecution, and commentary from that period notes the many cases featuring *Brady* error that had already come to light. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-98 (1987) (noting "disturbingly large number of published opinions" documenting intentional *Brady* misconduct and additional cases where prosecutors inadvertently failed to disclose); Hugo Adam Bedau & Michael L. Redelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 (1987) (identifying 35 cases of suppression of exculpatory evidence that led to wrongful convictions in capital cases).

Of course, whether now or in 1985, it is impossible to know the true scope of government error in applying *Brady*. As Justice White recognized in *Imbler v. Pachtman*, "unlike constitutional violations committed in the courtroom . . . the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface." 424 U.S. 409, 443-44 (1976) (White, J., concurring). "Once a trial is over most defendants no longer have counsel actively seeking exculpatory evidence, and most witnesses are effectively unavailable to the defense." Rosen, *supra*, at 702. For their part, prosecutors are either unaware of the nondisclosure if it stemmed from legal error, or

motivated to perpetuate if it stemmed from willful concealment.[2]

The persistent frequency of disclosure violations undermines Petitioners' argument that no district attorney would suppose his subordinates were in danger of wrongfully suppressing evidence. *Amici* strongly believe that the vast majority of prosecutors are ethical public servants committed to ensuring a fair trial, but the consistent occurrence of *Brady*-related error suggests Petitioners are wrong about the predictability of violations and calls for acknowledgment of the legal and ethical challenges that give rise to the problem.

B. *Brady* Confronts Prosecutors with Complex Legal Questions

Applying *Brady* is not a simple or mechanistic task. This Court has repeatedly observed that there will inevitably be close calls. *See, e.g.*, *Cone v. Bell*, __ U.S. __, 129 S.Ct. 1769, 1783 n.15 (2009) (noting "doubtful

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[2] Since most *Brady* violations likely remain hidden from view, Petitioners' claim that Connick's office handled "thousands of cases" while "only" four convictions of innocent people emerged is specious. Pet. Br. 46-48. Moreover, many of these thousands of cases would not have presented the opportunity to commit disclosure error since they ended in guilty pleas or were so minor that significant quantities of evidence about the crime, exculpatory or otherwise, would not have fallen into prosecutors' hands. *See United States v. Ruiz*, 536 U.S. 622, 625 (2002) (no duty to disclose exculpatory impeachment evidence prior to entry of plea). In any case, the long-term record of Petitioners' office may be open to question, as Respondents point out. *See* Resp. Br. 13-14; Armstrong & Possley, *supra* (noting Connick's office was "condemned repeatedly for withholding evidence").

[*Brady*] questions"); *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("judgment calls" inherent in *Brady* decisions); *United States v. Agurs*, 427 U.S. 97, 108 (1976) (prosecutors have to "deal[] with an inevitably imprecise standard"). Petitioners acknowledge this and even go as far as to admit, disturbingly, that some prosecutors may well be going about their work with "a defective understanding of Brady." Pet. Br. 38-39, 52-53; *see also* Br. of *Amicus* District Attorneys Ass'n of the State of N.Y. 15 (*Brady* decisions "different in every case, complex, and at times difficult").

Perhaps the most vexing aspect of the *Brady* analysis is its materiality component. If the evidence in question is not material, disclosure is not required, even though it might be useful to the defense. *See, e.g.*, *Agurs*, 427 U.S. at 108-13. Materiality, in turn, hinges on whether nondisclosure will result in deprivation of a fair trial considering all the proof adduced at trial. *See id.* at 112-13. This standard requires a prosecutor to determine *before trial* whether the trial would be deemed fair *afterward*, when the record is complete and the verdict rendered, if the evidence is not disclosed. *See id.; accord*, *United States v. Bagley*, 473 U.S. 667, 682 (1985)

Forcing prosecutors to estimate the fairness and outcome of the trial before it actually occurs poses quandaries, starting with the government's lack of information about how the trial will develop at the time materiality must be considered. One district court summarized the difficulty:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such [materiality] judgment necessarily is

> speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005). In addition, prosecutors with no prior experience representing criminal defendants may simply fail to see how seasoned defense counsel would utilize certain evidence, and therefore fail to view it as material.

A second challenge is that, since the materiality standard requires weighing a single piece of potentially exculpatory evidence against all inculpating evidence, the totality of which may seem especially powerful in the investigative stage, prosecutors may wrongly conclude that "the guiltier a defendant seems before trial, the less disclosure he is legally owed." Christopher Deal, Note, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1784 (2007). Because prosecutors naturally believe in the guilt of those they charge and labor to convict, the materiality analysis can encourage under-disclosure. The prosecutor must "achieve a state of

cognitive separation where she can simultaneously recognize that a piece (or pieces) of evidence objectively can create a reasonable doubt for the jury while still believing the case warrants prosecution." Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 662 (2002).

Making this recognition can be further complicated by cognitive biases, well documented in social science research, which can creep into prosecutorial determinations no less than any other sort of decision-making. Confirmation bias, which leads one to recall and emphasize information confirming his existing hypothesis and discount contradictory data, may result in prosecutors undervaluing potentially exculpatory evidence. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594-96, 1609-12 (2006). Selective information processing, which causes one to home in on information consistent with prior beliefs and filter out seemingly inconsistent facts, can cause prosecutors to take inculpatory evidence at face value while overly questioning the utility of potentially exculpatory evidence to the defense. *See id.* at 1596-99, 1611-12. These basic cognitive biases can contribute to a form of tunnel vision that makes guilt appear stronger than it otherwise might and thereby skew judgments about materiality. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351-52 (2006).

Aside from navigating materiality, applying *Brady* raises myriad other complex issues requiring prosecutors' informed and experienced legal judgment.

Because "in many cases, the scope of the relevant law is contested or its application is unclear," and approaches "vary among the federal district courts," the legal terrain is often hazardous. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2164, 2179 (forthcoming 2010), *available at* www.cardozolawreview.com/content/31-6/green.31-6.pdf. Such issues include:

- whether inadmissible evidence can be material, *see, e.g., United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) *cert. denied*, 494 U.S. 1008 (1990); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) at 5 (discussing distinction between admissible evidence and "favorable information" and applicable disclosure duties);

- whether the prosecutor's view of the veracity of the evidence matters, *see, e.g., United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1997);

- whether *Brady* applies to all impeachment evidence, *compare Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005) (impeachment evidence immaterial if "cumulative or impeaches on a collateral issue"), *with United States v. Wilson*, 481 F.3d 475, 480-81 (7th Cir. 2007) ("evidence that provides a new basis for impeachment is not cumulative and could well be material");

- whether implicit and unwritten understandings with government witnesses are subject to disclosure, *see, e.g.*, *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir.) (*en banc*), *cert. denied*, 129 S. Ct. 114 (2008);

- the degree of disclosure required prior to a guilty plea, *compare United States v. Ruiz*, 536 U.S. 622, 625 (2002) (no duty to disclose exculpatory impeachment evidence prior to plea), *with McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (production of evidence establishing innocence may be required prior to plea);

- the proper timing of disclosure, *compare United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (must only be in time for "effective use" of evidence), *with Leka v. Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (disclosure "on the eve of trial, or when trial is under way" may be tardy);

- whether *Brady* applies to unrecorded information, *see United States v. Rodriguez*, 496 F.3d 221, 222 (2d Cir. 2007);

- whether third parties who produced information to the government that might exculpate defendants can object to and prevent disclosure, *see United States v. Williams Cos.*, 562 F.3d 387, 390 (D.C. Cir. 2009); Mike Scarcella, *Arms Company Fights to Keep DOJ Docs Secret*, NAT'L L. J., June 28, 2010, at 17, 20; and

- whether *Brady* applies to files reflecting current leads and ongoing investigations, *compare*

Downs v. Hoyt, 232 F.3d 1031, 1037 (9th Cir. 2000) (no disclosure of information reflecting leads and investigations required absent existence of exculpatory information), *cert. denied*, 532 U.S. 999 (2001), *with Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir.) (exculpatory material should have been produced in part because it could have been "used to uncover other leads and defense theories and to discredit the police investigation"), *cert. denied*, 479 U.S. 962 (1986).

Brady's tendency to confound prosecutors is illustrated by this case. The jury heard ample evidence that several prosecutors were involved in the non-production of evidence exculpating Thompson, and that they were confused about what *Brady* demanded of them. *See* Resp. Br. 17-20, 56-60. Petitioners strive to relitigate the strength and meaning of that evidence in this Court and argue that trial tactics like "skillful cross-examination" duped the jury into its verdict. Pet. Br. 57. But it seems far more plausible that, as Respondents showed at trial, some or all of the four prosecutors involved simply misanalyzed the relevant *Brady* questions than that all four joined in an illegal conspiracy to deliberately violate Thompson's constitutional rights.

C. Prosecutors Face Institutional Pressures That Compound the Difficulty Inherent in Correctly Applying *Brady*

The analytical difficulties prosecutors face when deciding what evidence to produce are magnified by a host of institutional pressures. One of these is simply

the nature of the adversary system, which places paramount emphasis on winning. Writing in 1957, Judge Jerome Frank noted the "peculiar dilemma" of the "reflective, conscientious prosecutor" assigned the task of safeguarding the defendant's rights while simultaneously fulfilling "another duty, that of convicting a criminal." Jerome Frank & Barbara Frank, NOT GUILTY, 233 (1957). Given this unique duality not faced by defense lawyers obligated to focus exclusively on zealously representing their accused clients, prosecutors could "scarcely [be] blame[d]" for falling back on standard adversarial "wiles and stratagems." *Id.*

In the same vein, Richard Uviller, an assistant district attorney and later a Columbia Law School Professor who admitted regarding his fellow prosecutors as "the flower of the bar," cautioned:

> Young assistants think of themselves primarily as advocates. The case they make, or (more likely) inherit from a law enforcement unit, is cast immediately as a trial scenario. It is refined and amplified – as it usually requires – in preparation for exposure to a jury. In this posture, of course the Assistant cares a good deal more for supplementary information that fortifies the case against the defendant than new data that calls his thesis into question. . . .
>
> [E]ven the best of the prosecutors – young, idealistic, energetic, dedicated to the interests of justice – are easily caught up in the hunt mentality of an aggressive office.

H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1699-1700, 1702 (2000). As the former Inspector General of the Justice Department responsible for investigating allegations of civil rights violations by prosecutors put it: "there is a tremendous amount of pressure to be aggressive and to push the limit." Symposium, *The Changing Role of the Federal Prosecutor*, 26 FORDHAM URB. L.J. 737, 744 (1999) (remarks of Michael R. Bromwich). Many prosecutors are young and, as Connick acknowledged was true of many of his assistants, "fresh out of law school," JA 442, and are therefore especially vulnerable to such pressure.

Winning defuses both internal office pressures and external public and political ones. Internally, prosecutors are often evaluated based on their wins and losses. One survey of 103 state prosecutors revealed that "a number of prosecutors view their primary function in terms of conviction and punishment," and that the "conviction rates of prosecutors are used as a measurement of success at prosecutorial work." George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 121-22 (1975). Offices have been reported to calculate and distribute win-loss "batting averages" and post convictions and acquittals on bulletin boards with color-coded stickers. *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 44 (2009). One of Thompson's prosecutors testified to "pressure on DAs to get convictions" in Connick's office. JA 190. While obtaining convictions should and usually does reflect a properly administered office that charges defendants

appropriately and competently handles cases, it can wrongly become the only thing that matters to some prosecutors.

Externally, state prosecutors like Connick are elected and so understandably prefer to win their cases in order to enhance the odds of continuing in office. A record of convictions also assists prosecutors' offices in their ongoing jockeying with legislatures over budgets. When a case is highly publicized, as was Thompson's, internal and external pressures on the assigned prosecutors only increase.

* * * * *

For all these reasons – longstanding empirical evidence that *Brady* violations are "a persisting problem" for prosecutors, Pet. Br. 24; the inherent analytical challenges posed by the doctrine; and the well-known institutional pressures brought to bear on prosecutors making disclosure decisions – it is plain to most prosecutors, and should have been obvious to Petitioners, that *Brady*-related training is essential. *See Bd. of County Comm'rs*, 520 U.S. at 407 (liability may stem from taking approach defendant should know will fail to prevent tortious conduct). There was in 1985 and is today "a glaring need for training [prosecutors] on constitutional standards" relating to disclosure, Pet. Br. 27, and no additional pattern of past violations by Connick's office was necessary before Petitioners should have reached that conclusion.

II. Law School, the Bar Exam and Professional Discipline Are Insufficient Guarantors of Defendants' Constitutional Right to Disclosure

The primary reason Petitioners and *amici* claim prosecutors' violations of *Brady* could never be predicted absent a history of earlier violations is the fact that, prior to their hiring, prosecutors have made it through law school, passed a bar exam, and assumed the status of licensed professionals personally responsible for "obeying the standards of their own profession." Pet. Br. 19, 25; *see also* Br. of District Attorneys Ass'n of the State of N.Y. 11. Petitioners also cite the "ethical regime" of professional discipline as a reason why it would never have occurred to Connick to train his subordinates. Pet. Br. 28-29. In fact, these are porous defenses against the violation of constitutional rights.

A. Law School and the Bar Exam Do Not Adequately Equip Prosecutors

Petitioners' broad faith in law school and the bar exam to ensure accurate and ethical *Brady* decision-making is at odds with the facts. First, though Connick believed his assistants "follow[ed] the rules in 99.9 percent of the cases," he fully appreciated the inherent limitations of any large staff of prosecutors in a major jurisdiction like New Orleans:

> Connick . . . said his prosecutors labor under difficult circumstances where mistakes can happen. Many are inexperienced. Turnover is rampant. He has 80 prosecutors, and this year, 30 are new. Next year, 30 more will be new. His

> prosecutors average 30 jury trials year – a daunting caseload – and they can find it difficult to keep track of what evidence has been disclosed in every case they handle, Connick said.

Armstrong & Possley, *supra*; *see also* Resp. Br. 15. Perhaps in recognition of these "difficult circumstances," Petitioners claim Connick took various informal steps intended to help and monitor subordinates, though they concede none "comfortably equate[d] to a 'training program' under *Canton*." Pet. Br. 42. But if Connick truly believed prosecutors were adequately prepared by law school and the bar to handle all aspects of their jobs, he presumably would not have bothered instituting such procedures. While it was up the jury to decide whether the informal practices Petitioners now extol were sufficient to prevent constitutional violations – a question the jury fairly resolved against Petitioners – their claimed existence belies Petitioners' current litigation position that, actually, nothing more than a diploma and law license were needed.

In reality, it is unlikely that the head of an office of young, overworked lawyers practicing almost any sort of law would place the kind of absolute trust in law school and licensing Petitioners claim Connick did when authorizing subordinates to make the most crucial decisions of life and liberty. As for law school, Petitioners point to no evidence in the record indicating what the prosecutors who handled Thompson's case actually learned there about *Brady*, the extent and quality of their instruction, and what if anything they might have retained after graduating. Courses like criminal law and criminal procedure may

last no more than one or two semesters and necessarily cover the waterfront of related subjects. Criminal procedure is not a required course at many law schools. Discussion of *Brady* may consume no more than a class or two, if that, and it is extremely unlikely that anything more than the most superficial understanding of the subject can possibly be imparted. *Amici* are on the front lines of legal education and firmly believe that serious comprehension of *Brady*'s legal complexities is not typically achieved in law school. Pretending that newly minted law graduates are "extensively educated" on *Brady*, Pet. Br. 27, simply ignores reality.

Nor do professional responsibility courses prepare graduates for the ethical pitfalls that sometimes accompany tough *Brady* decisions. Particularly in the late 1970s and early 1980s, when the prosecutors who staffed Petitioners' office in 1985 were in law school, professional responsibility courses were not uniformly mandatory and usually consisted of a single one-hour, pass-fail course dedicated largely to memorizing the ABA canons. *See* Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 45 (2009). Then and now, such classes also concentrate primarily on private civil practice and may, paradoxically, only reinforce adversarial tendencies that can be counterproductive when it comes to meeting the government's criminal disclosure obligations. As one ex-prosecutor commented a few years after Thompson's trial: "Law school training in professional responsibility tends, quite understandably, to focus upon the private practitioner, whose obligation, in significant part, is to zealous advocacy on behalf of the particular client. . . . It is with this indoctrination that many individuals enter into service as prosecutors."

Kenneth J. Melilli, *Prosecutorial Discretion in an Adversarial System*, 1992 B.Y.U. L. REV. 669, 686 (1992).

Placing faith in bar exams puts supervising prosecutors on even shakier ground. Such exams may or may not include *Brady*-related questions, and those who pass may or may not have managed to study for that part of the test or gotten such questions right. It is the rare lawyer who, having frenetically crammed in the weeks before the test, will retain much of anything so tenuously absorbed. Rarer still is the lawyer who would stake any serious outcome once in practice on what she recalls from studying for the bar exam, or the law firm that would be so cavalier with potential malpractice liability.

Chief Justice Burger recognized the fallacy of Petitioners' argument long ago when he urged the bar to "[f]ace up to and reject the notion that every law graduate and every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence." Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM. L. REV. 227, 240 (1973). He continued:

> Our traditional assumption that every lawyer, like the legendary Renaissance man, is equipped to deal effectively with every legal problem probably had some validity in the day of Jefferson, Hamilton, John Adams and John Marshall, but that assumption has been diluted by the vast changes in the complexity of our social, economic and political structure.

Id. at 239. The Chief Justice likened the view espoused by Petitioners to the questionable notion that any doctor who graduates from medical school and is licensed by the state is "competent to perform surgery on the infinite range of ailments that afflict the human animal." *Id.* at 231. No more so is any newly licensed lawyer automatically prepared to perform any legal task, however specialized and complex, as Petitioners assert. *See, e.g.*, *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (noting "trend toward specialization" in legal practice).

B. The Possibility of Professional Discipline is Too Remote to Deter Prosecutorial Misconduct

The "ethical regime designed to reinforce the profession's standards" invoked by Petitioners is equally ineffective as a tool to protect constitutional rights. Pet. Br. 28. The fact is, almost no prosecutor who commits misconduct actually faces the "severe consequences" Petitioners cite: suspension or disbarment. *Id.*

One study found that, while charges were dismissed, convictions reversed or sentences reduced in 2,000 cases due to prosecutorial wrongdoing since 1970, only 44 of these resulted in discipline of prosecutors, and none led to criminal prosecution. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 60 (2005). In reviewing 53 cases of wrongful convictions in New York, the State Bar Association's Task Force concluded: "Research has not revealed public disciplinary steps against prosecutors. . . . There is little or no risk to the specific official involved resulting from a failure to follow the rule." N.Y.

REPORT at 29. In California, a commission created by the legislature in 2004 analyzed 54 cases where misconduct led to the reversal of convictions and determined that none had resulted in a report to the state bar, though state law requires California judges to give such notice. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (2008), www.ccfaj.org/documents/CCFAJFinalReport.pdf (hereafter "CAL. REPORT").

In 1987, law professor Richard Rosen examined several compilations of ethics decisions and other published sources and surveyed each state's bar counsel in an effort to determine how frequently prosecutors who violated *Brady* faced professional discipline. *See* Rosen, *supra*, at 718. He uncovered only nine instances where discipline was even considered, and 35 states reported that no complaints had ever been filed. *Id.* at 719-31. When contrasted with the "numerous reported cases" of *Brady* violations contained in judicial decisions, Rosen's scant findings indicated that "reliance on the Disciplinary Rules as a deterrent for *Brady*-type misconduct is misplaced." *Id.* at 731. A later study confirmed that few additional cases had been brought in the ensuing decade. *See* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881-82 (1997); *see also Jones*, 620 F. Supp. 2d at 177 ("Neither referral to OPR, other disciplinary bodies, or public criticism has sufficiently deterred prosecutorial misconduct.").

Petitioners note that a prosecutor in Connick's office who learned of the suppression of the blood evidence in Thompson's case in 1994 and did not

report it was later sanctioned. *See* Pet. Br. 28. Such discipline is exceedingly rare, however, and even this prosecutor was merely reprimanded. *See In re Riehlmann*, 891 So.2d 1239, 1248-49 (La. 2005). The Louisiana Supreme Court actually rejected a disciplinary board's recommendation of a six-month suspension. *See id.* More importantly, the three prosecutors who bore responsibility for failing to produce *Brady* material to Thompson aside from the junior-most assistant who died in 1994 (Deegan) received no sanction at all.

Finally, some *amici* who support Petitioners stress that "tradition and experience justify" the belief that most prosecutors will fulfill their duties, and that chief prosecutors can therefore simply presume that they will do so. *See* Br. of *Amici* Nat'l League of Cities, *et al.* 9 (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987)). The same could be said of police officers, however, most of whom are also surely well intentioned public servants bound by their departmental rules as well as federal and state law proscribing the violation of suspects' rights. Nevertheless, this Court has recognized that failure to train law enforcement agents when the need is obvious can give rise to liability. *See Canton*, 489 U.S. at 390. The question is not whether most prosecutors or police officers are presumptively good people who mean to meet their obligations – *amici* agree that they are – but whether it is clear that training is vital to enable them to do so.

III. *Brady*-Related Training Is Essential to Ensure Proper Disclosure

Petitioners may "strain[] to imagine . . . when it should *ever* be 'obvious' to a district attorney that he needs to train prosecutors to know and obey the law," Pet. Br. 31 (emphasis in original), but there is actually wide agreement among prosecutors and experts that effective and ongoing *Brady*-related training is a fundamental component of administering a prosecutor's office. In fact, today "most prosecutors' offices have extensive training programs on *Brady*." Gail Donaghue, *Section 1983 Cases Arising from Criminal Convictions*, 18 TOURO L. REV. 725, 731 (2002); *accord* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1989 (Stephanos Bibas, reporter) (forthcoming 2010), *available at* www.cardozolawreview.com /content/31-6/group_reports.31-6.pdf ("Prosecutors' offices in large metropolitan areas typically provide in-house training on various aspects of criminal practice, including disclosure and ethical obligations").

At the federal level, the Stevens case and others prompted "a thorough review" of the Department of Justice's discovery policies and training, leading to the announcement that federal prosecutors will participate in annual *Brady* training to be provided by a discovery coordinator assigned to each United States Attorney's Office and litigating component. *See* U.S. DEP'T. OF JUSTICE, DEP. ATT'Y GEN. MEM., ISSUANCE OF GUIDANCE AND SUMMARY OF ACTIONS TAKEN IN RESPONSE TO THE REPORT OF THE DEPARTMENT OF JUSTICE CRIMINAL DISCOVERY AND CASE MANAGEMENT WORKING GROUP 3 (Jan. 4, 2010), http://www.justice

.gov/dag/dag-memo.pdf. Even before the recent spate of cases featuring *Brady* error, the United States Attorney's Manual "recogniz[ed] that it is sometimes difficult to assess the materiality of evidence before trial" and therefore "encourage[d] prosecutors to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation." DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, §§ 9.5001(B)(1), (E) (1997).

The Department of Justice's confidence in training to avert legal violations can also be seen in how it enforces criminal laws binding corporations. The Department will defer prosecution or recommend lesser sanction for entities that adopt employee training programs as part of a compliance regime designed to deter the commission of future violations, and penalties under the sentencing guidelines are lower for companies that create such programs. *See id.* §§ 9-28.300, 9-28.800 (2008); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2009). Petitioners' view that prosecutors need no *Brady* compliance training conflicts, ironically, with the position prosecutors themselves take toward legal compliance in the private sector.

States and municipalities have also established disclosure training programs. In New York, nearly a dozen prosecutors' offices in larger counties have full-time training directors who conduct monthly sessions on prosecutors' disclosure duties, among other subjects, including the ethical component of making decisions on production to the defense. *See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups*,

supra at 1989 n.32. In addition to training programs in individual counties, the New York Prosecutor's Training Institute "makes sure that assistants in offices large and small, in every area of the State, have access to free, quality programs." *Hearings before N.Y. State Bar Ass'n Task Force on Wrongful Convictions* (Feb. 13, 2009) (statement of Richard A. Brown, Queens County District Attorney), http://www.daasny.org/DABrownWrongfulTestimony.html. California's District Attorneys Association similarly "provide[s] intensive training to thousands of prosecutors, peace officers and allied professionals each year" in subjects including disclosure, *see* Cal. District Attorneys Ass'n, Training Dept., www.cdaa.org/training/index.asp (last visited August 9, 2010), and that state's Commission on the Fair Administration of Justice recommended such training for prosecutors because "compliance with *Brady* obligations should not be left up to each individual deputy's own interpretation of statutory and case law." CAL. REPORT at 87, 90-91. While state offices undoubtedly train in different ways depending on their particular needs and caseloads, and *amici* agree that one size hardly fits all in this area, offices are increasingly unlikely to take Petitioners' extreme view that training is completely unnecessary.

Professional groups concur. The ABA's Project on Standards for Criminal Justice promulgated a standard *in 1971*, long before Thompson's case, providing: "Training programs should be established within the prosecutor's office for new personnel and for continuing education of his staff." ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Standard 2.6 (Approved draft 1971); *see also* ABA Formal Op. 09-454, *supra*, at 8 (supervisory lawyers "must ensure that subordinate

prosecutors are adequately trained regarding [their] obligation" to disclose evidence to defendants). Likewise, the National District Attorneys Association's National Prosecution Standards provide: "The prosecutor and his staff should participate in formal continuing legal education." NAT'L DISTRICT ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 9.5 (2d ed. 1991).

In 2009, several *amici* joined the ABA's Criminal Justice Section, the National District Attorneys Association and the National Association of Criminal Defense Lawyers to sponsor a symposium to examine *Brady* in operation and develop best practices for compliance. *See* Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1946 (forthcoming 2010), *available at* www.cardozolawreview.com/content/31-6/yaroshefsky.31-6.pdf. One working group consisting of prosecutors, defense attorneys, judges and academics focused on prosecutor training and "agreed on the need for both formal programs and informal training on *Brady* and disclosure." Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups, supra* at 1989. The group specifically considered Thompson's case and "rejected the notion, advanced by at least one district attorney [Connick], that district attorneys may rely exclusively on law school training and prosecutors' own sense of ethics as sufficient discovery training." *Id.* In addition to training newly hired prosecutors, the group concluded that training "should also remain periodic, perhaps annual or semiannual, throughout a prosecutor's career." *Id.* at 1991.

Importantly, training in disclosure consists of more than simply imparting information about applicable substantive law; it also entails education in prosecutorial ethics. Writing almost two decades ago, Judge Kozinski emphasized the essential nature of such training in a case where the Ninth Circuit vacated a conviction following the government's suppression of a cooperation agreement with a witness:

> The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. But the temptation is always there: It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.
>
> One of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach. Training to impart awareness of constitutional rights is an essential function of an office whose administration of justice the public relies on.

United States v Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) (citations, quotations and punctuation omitted). The 1971 ABA standards also stressed that "[t]raining within the prosecutor's office should give special emphasis to ethics." ABA STANDARDS, *supra*, Standard 2.6.

More recently, exonerations brought about by DNA testing have increased recognition of the need for systematic training of the sort described by Judge Kozinski. For example, Dallas' District Attorney Craig Watkins, who established a specific unit to investigate allegations of wrongful convictions in light of Dallas's particularly high number of exonerations, noted that the unit is also responsible for training newer assistants "on the ethical side of a prosecutor's job – things like the importance of properly dealing with exculpatory evidence." Radley Balko, *Is This America's Best Prosecutor?*, REASON, Apr. 7, 2008, http://reason.com/archives/2008/04/07/is-this-americas-best-prosecut. Prosecutors must be taught "to think about their jobs in a different way," Watkins avers; "[w]e shouldn't be judging young prosecutors by how many convictions they win, or by how many people they put in jail." *Id.* Watkins also stresses the importance of complying with *Brady* in hiring interviews. *See* Yaroshefsky, *Foreword*, *supra*, at 1952. The New York State Bar Association's task force similarly recommended that prosecutors receive regular training "to make sure that the relevant due process principles are fully internalized and become the starting point for all cases." N.Y. REPORT at 37.

Perhaps most importantly, mandatory training helps foster an office environment necessary to overcome the pressures that can lead to misconduct. It is widely accepted that office culture plays a critical role in determining prosecutors' behavior. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 346-47 (2003) (discussing former culture of Dallas District Attorney's Office to encourage racial discrimination in jury selection and give incoming prosecutors "formal training in excluding minorities from juries"). "Conscientious

commitment to an office policy or tradition goes a long way toward the ideal of quasi-judicial performance" by prosecutors. Uviller, *supra*, at 1718. Ongoing training about and emphasis on the importance of matters like *Brady* compliance promotes the proper internal culture. It sends a message to junior prosecutors and thereby deters violations – not simply because assistants have a greater knowledge about *Brady* law, but because they sense its clear importance to supervisors and the office as a whole. The Queens County District Attorney testified to the New York task force "that he takes every opportunity to send the clearest message to his assistants that their paramount responsibility is 'to do justice.' *Training is the most important way of sending the unequivocal message.*" N.Y. REPORT at 37 (emphasis added).

Communicating the importance of protecting fundamental rights is especially crucial if office policy is to "turn over what [is] required by state and federal law, but no more," as Petitioners describe Connick's. Pet. Br. 6-7. In contrast to Connick's view, this Court has repeatedly urged prosecutors to "err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone*, 129 S. Ct. at 1783 n.15 (and authority cited therein). Ethics rules, like Model Rule 3.8(d) and state analogs, similarly call for broader disclosure than is strictly mandated under *Brady*. See ABA Formal Op. 09-454, *supra*, at 4-5. If office policy cuts in the opposite direction, as Connick's apparently did, training to at least make sure required production actually occurs is all the more vital.

The consensus that has developed in support of the need to provide training in *Brady*'s legal and ethical mandates undermines Petitioners' repeated assertions

that "no amount of training could have prevented" an intentional *Brady* violation. Pet. Br. 21; *see also id.* 39-40 56, 61; Br. of Nat'l District Attorneys Ass'n, *et al.* 6. Initially, Respondents convincingly demonstrate that the jury had ample grounds to reject Petitioners' "single rogue prosecutor" theory. *See* Resp. Br. 57-63. More generally, it is shortsighted to see intentional violations only as the products of the innate character defects of incurably immoral prosecutors. Violations also stem from the institutional pressures on prosecutors discussed in Point I, *supra* – a point the United States Attorney for the Northern District of Illinois, Patrick Fitzgerald, illustrated in a recent address:

> If you give a person the MPRE and ask, "You find *Brady* material on a Saturday afternoon. What do you do? A: turn it over. B: shred it," everyone will get the answer (option A) right. But the answer might not be clear to the person who is sitting alone in his office on a Saturday afternoon – particularly if it is an important case, particularly if it is a heated case, particularly if it involves defense counsel that he really does not get along with, particularly if it is a close case. He might start to doubt himself and think, "It's really not *Brady* material. I'm not really worried about it. It's not that big of a deal."

Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 16-17 (2009). The scenario Fitzgerald describes – surely a more common one than the prosecutor who sets out to ruin defendants' lives by wrongfully imprisoning them because he is incorrigibly evil – is the basic sort of

quandary systematic and repeated *Brady* training exists to address by helping prosecutors build the fortitude to make close calls under pressure and by sending the crucial message that the office values ethical behavior above burnishing its conviction record.

If Petitioners are correct that training is powerless to deter intentional wrongdoing, it is hard to see the point of the entire field of legal ethics. Stanford Law Professor Deborah Rhode, a leading expert in professional responsibility, writes that, while not a panacea certain to prevent any and all lapses, ethics instruction can shape conduct:

> More than a hundred studies evaluating moral education courses find that well-designed curricula can significantly improve capacities of moral reasoning and that individuals in their twenties and thirties gain more than younger students. . . .
>
> If, as most evidence suggests, some individuals will be helped to some extent in some contexts when they confront difficult moral questions, that is a sufficient justification for ethics coverage.

Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 46-48 (1992); *see also* Derek Bok, *Can Ethics Be Taught?*, CHANGE, Oct. 1976 at 26, 30 ("Although the point is still unproved, it does seem plausible to suppose that the students in these courses will become more alert in perceiving ethical issues, more aware of the reasons underlying moral

principles, and more equipped to reason carefully in applying these principles to concrete cases").

The widespread adoption of training by prosecutors' offices diminishes the likelihood of future cases like Thompson's based on deliberate indifference arising from the failure to train. Some *amici* supporting Petitioners claim that potential § 1983 liability will force prosecutors to establish continuing education programs when they otherwise might have steered resources elsewhere, *see* Br. of *Amici* Nat'l District Attorneys Ass'n, *et al.* 12, but the prevalence of such programs already in place and the wide consensus supporting their necessity largely obviates these concerns.

Similarly, Petitioners' and their *amici*'s many warnings that affirming Thompson's award will lead to runaway "vicarious liability" for every sort of mistake are vastly overstated. Pet. Br. 35-36. As Petitioners note, the standards for failure-to-train liability that guided the district court in this case were largely derived from *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961 (1993). *See* Pet. Br. 33-34. Yet there has been no flood of §1983 liability bankrupting prosecutors' offices in the districts comprising the Second Circuit in the 18 years since that decision. In fact, research reveals no reported decision affirming or reporting a finding or judgment of liability on the part of prosecutors for failure to train on *Brady* in the Second Circuit following *Walker* – something one would expect if there was merit to the dire predictions voiced by Petitioners and supporting *amici*. Nor is there any indication there that frivolous claims have notably increased or

that prosecutors have shrunk from aggressively pursuing cases when appropriate.

Moreover, other prosecutorial transgressions mentioned by the dissent below and cited by Petitioners and their *amici* as fertile ground for future lawsuits – wrongful searches and seizures, failure to give *Miranda* warnings, or errors relating to experts and sentencing, *see* Pet. Br. 35, 53 – are less likely to generate civil proceedings because, unlike the secret suppression of exculpatory evidence, they typically become known to the defendant or his counsel during the criminal case and can be addressed and remedied in that proceeding before prejudice results, diminishing the likelihood of a later civil suit.

Precisely because training is now so widely understood to be a critical ingredient in any well-administered prosecutor's office, it would be unfortunate if the Court's decision in this case validates Petitioners' notion that it is actually unnecessary. As *amici* stress, prosecutors' offices habitually face budget constraints and understandably look for areas to cut. *See* Br. of *Amicus* Nat'l District Attorneys Ass'n, *et al.* 8-9. Indeed, in advertising its training services to local prosecutors' offices, the National College of District Attorneys cited *this very case* as a warning against forgoing training and urged "reexamination of the old attitude that 'Training is the first thing to go.'" Mary M. Galvin, *Warning: Training Cuts Can Be Hazardous to Your Financial Health*, 42 PROSECUTOR 32, 32 (Oct./Nov./Dec. 2008). It would be ironic if a jury's factual finding that Petitioner's inadequate training caused Thompson's horrific ordeal led not to compensation for Thompson, but to license to scale back the very training most prosecutors now

agree can help prevent such tragedies in the first place.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

HARRY F. CONNICK, District Attorney, *et al.*,
Petitioners,

- against -

JOHN THOMPSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS HARRY F. CONNICK, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

The District Attorneys Association of the State of New York ("DAASNY" or "association") is a state wide organization composed of elected county District Attorneys from throughout New York State, as well as assistant district attorneys, a membership body that is approximately 2,000 prosecutors. Members of the DAASNY are from some of the largest prosecutor offices, i.e., New York County, which employs hundreds of prosecutors, and some of the smallest, which may have only a single prosecutor. In their work as prosecutors, the association's members continually confront how best to exercise their advocacy function in fulfilling their constitutional disclosure obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady*").

The staggering multi-million dollar judgment against the Orleans Parish District Attorney's Office ("the district attorney's office") for that office's failure to train on *Brady*, upheld in *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008) ("*Connick I*"), *aff'd en banc by equally divided court*, 578 F.3d 293 (5th Cir. 2009) ("*Connick II*"), if affirmed, threatens the very financial existence of public prosecutor offices nationwide. The *Connick* decision makes district attorney offices financially liable merely for the misconduct of its employee-prosecutors, not for the misconduct of the entity itself, solely as a result of

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[1] The parties have consented to the filing of this *amicus curiae* brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No persons or entities other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

that employment relationship, thus greatly expanding municipal liability contrary to this Court's precedent. The lower court's ruling, therefore, presents a grave threat to the financial existence or stability of many of the association's members.

SUMMARY OF ARGUMENT

Liability of a municipal entity under 42 U.S.C. § 1983 ("§ 1983") for inadequate training is confined to the "limited circumstances . . .," *City of Canton v. Harris*, 489 U.S. 378, 387 (1989), of a municipality's deliberate indifference to the need for employee training on a particular aspect of their duties and when the specific inadequacy "actually caused" the constitutional injury. *See id.* at 391; *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

This Court has never applied the "failure to train" rubric of *City of Canton* to sustain liability against a district attorney's office as a culpable municipal actor for a violation of *Brady* by assistant prosecutors in a single case. A district attorney's office is different from other municipal entities, such as police departments, when it fulfills its advocacy function through its individual assistant prosecutors, a difference recognized by this Court when considering an individual prosecutor's absolute immunity from suit for conduct done in his or her advocacy function, such as a failure to disclose *Brady* at trial. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976). Yet, the public policy considerations that underlie the recognition that a public prosecutor is indeed different from other municipal actors, as in the immunity context, warrants the conclusion that a

district attorney's office itself is not liable under the kind of failure-to-train claim asserted and sustained by the lower courts in *Connick I and II*. The nature of the assistant prosecutor's role and the complexity of his or her constitutional obligation under *Brady*, in a particular case, preclude application of the failure-to-train rubric to a district attorney's office itself based on a single episode. The constitutional obligation to disclose is different for every case, determined by the nature of the particular evidence in question and the overall proof in evaluating whether non-disclosure would create (or did create) a "reasonable probability" of a different result were disclosure to occur. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Because the nature of a prosecutor's *Brady* obligation is defined by a particular case, therefore, the "moving force" for such a violation in a single case is necessarily the individual prosecutor(s), not the office itself. A failure-to-train claim against a public prosecutor's office based upon a violation of *Brady* in a single case is thus inimical to the accepted proposition that the municipality by its own culpable conduct be the direct cause of the injury as a predicate to liability.

ARGUMENT

A § 1983 FAILURE-TO-TRAIN CLAIM AGAINST A DISTRICT ATTORNEY'S OFFICE ITSELF BASED ON A SINGLE VIOLATION OF *BRADY* BY ASSISTANT PROSECUTORS OF THE OFFICE IS NOT SUSTAINABLE UNDER *MONELL*.

The Role of The Prosecuting Attorney And The Nature of The Individual Prosecutor's Function Under *Brady* Negates Imposition of Liability on The Prosecuting Entity Itself For a Single Violation of *Brady*.

The necessary predicate for municipal liability under § 1983 is that the governmental body's "*deliberate* conduct," *Bd of Comm'rs of Bryan Co. v. Brown*, 520 U.S. 397, 404 (1997) (italics in original), was the "moving force [behind] the constitutional violation." *City of Canton*, 489 U.S. at 389 (brackets in original) (quoting from *Monell*, 436 U.S. at 694 and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). The high evidentiary threshold, which is required before governmental liability is reached pursuant to *Monell*, ensures that the municipality is held accountable not simply on the employer-employee relationship, but, instead, on the entity's own conduct committed with "the requisite degree of culpability . . ." and with "a direct causal link between the municipal action and the deprivation of federal rights." *Bryan Co.*, 520 U.S. at 404.

The risk of imposing municipal liability on a *respondeat superior* basis is the greatest when, as in the *Connick* case, the municipality is faced with the "thoroughly nebulous . . ." 1983 claim that a

particular injury was caused by a municipality's inadequate training or supervision. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion). This is particularly so when, again as in *Connick*, a plaintiff seeks redress based on a single incident. *See id.* at 824 ("But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault . . . and the causal connection between policy and the constitutional deprivation"); *See also, e.g., City of Canton,* 489 U.S. at 399-400 (concurring opinion in part and dissenting opinion in part of O'Connor, Scalia and Kennedy, JJ.) ("Allowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of Monell.").

Before a municipality's failure-to-train will result in liability, stringent proof of culpability and causation are required: First, the municipality must have failed to act with deliberate indifference, which requires notice to the municipality's final policymaker that training was needed to avoid further constitutional violations, and yet, no action was taken; and, second, the specific inadequacy in training had a direct causal link to the constitutional violation. *See, e.g., Bryan Co.*, 520 U.S. at 404; *City of Canton*, 489 U.S. at 391 and 395.

Notably, however, the unique role of the individual prosecutor as a municipal actor, and the individualized and case-specific nature of the *Brady* determination, militate against imposition of liability on a district attorney's office under *Monell* for a failure-to-train claim based on a single episode of a

violation of the constitutional disclosure duty in a particular case.

The prosecutor's determination of what to disclose, and when, under *Brady,* is one of the essential components of the prosecutor's advocacy function. This determination necessarily comprises the exercise of prosecutorial judgment and experience applied to a specific set of facts: the evaluation of specific evidence and of the overall proof in a particular case, a duty exclusively assigned to the prosecutor. In this regard, the prosecutor, in his or her advocacy role, is markedly unlike other municipal actors, such as, for example, the police officer. As observed in another context, but applicable here:

> "The prosecutor must ask such lawyer's questions as whether an item of evidence has exculpatory or impeachment value and whether such evidence is material. It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context."

Jean v. Collins, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (per curiam) (Wilkinson, C.J., concurring in judgment) (internal quotation marks omitted).

The importance of this prosecution function has already been recognized by the Court through the

conferral of absolute immunity when a prosecutor, or his or her supervisor, including the ultimate policymaker, the district attorney, is sued in their personal capacity in a § 1983 suit for violating *Brady* in a particular prosecution. *See, e.g., Imbler,* 424 U.S. at 424-427; *Van de Kamp v. Goldstein*, 555 U.S. ____, 129 S.Ct. 855 (2009). True, a district attorney's office itself may not enjoy similar immunity for its culpable conduct. *See Owen v. City of Independence, Mo.,* 445 U.S. 622 (1980). But, the principle which underlies *Imbler*, that a prosecutor's decision whether to disclose evidence is an essential component of the adversary system that rests on "the legitimate exercise of prosecutorial discretion . . .," *Imbler,* 424 U.S. at 431 n.34, requiring its exercise unimpeded and without distraction by the fear of civil lawsuits, applies as well to the inapplicability of failure-to-train liability for the district attorney's office itself for the same conduct based on a single violation of *Brady*.

In other words, *Imbler* recognized that less than absolute immunity for the exercise of a prosecutor's discretion in deciding what evidence falls within *Brady* in a particular case would result in "full disclosure . . .," *Imbler,* 424 U.S. at 431 n.34, which would impose a "duty exceeding the disclosure requirements of *Brady* . . ." and "weaken the adversary system . . . ." *Id.* Notably, the result reached by the Fifth Circuit in *Connick I* and *II* effectively achieves the same result under *Monell.* Sustaining municipal liability in this case based on a single episode of a *Brady* violation will deter, not facilitate, the exercise of the prosecutor's discretionary disclosure determination and effectively require training (necessarily involving the federal courts to define its content) as district attorney offices

seek to avoid the risk of incurring huge financial judgments not for their own culpable conduct, but for that of their employee prosecutors.

This case exemplifies the danger of allowing municipal liability to flow from a single episode of a *Brady* violation. The plaintiff's theory at trial was that since the district attorney's office did not have a policy of open file discovery in 1985, the office should have had a *Brady* policy and training program of sufficient specificity (but which content was never proven) to prevent the violation in plaintiff's case. *See, e.g.*, App. 255-256 (relevant portion of trial testimony). Indeed, this was the heart of the testimony from plaintiff's expert at trial. *See, e.g.*, App. 250-271 (trial testimony of Joseph Lawless, Esq.). However, plaintiff's evidence never proved at trial what *specific aspect* of the training in the district attorney's office in 1985 was deficient and how that identified deficiency in municipal training, rather than the misconduct of the individual prosecutors, caused the violation of plaintiff's constitutional rights; put another way, the plaintiff never proved the content the district attorney office's training in 1985 should have included that would have prevented the prosecutors' misconduct and plaintiff's injury. Instead, and fatally to his claim, plaintiff argued that the district attorney's office's training could have been better, but only in the most general terms by including more formal training sessions and codified rules. *See, e.g.*, App. 255-257 (relevant excerpt of trial testimony); *See City of Canton*, 489 U.S. at 391 ("Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training . . . . Such a claim could be made about almost any encounter resulting in injury,

yet not condemn the adequacy of the program . . .").
Vague and generalized assertions of inadequacies in a municipal training program, however, if allowed to sustain liability will fundamentally alter the *Monell* legal landscape, for such a claim can be asserted in every failure-to-train lawsuit against a district attorney's office. *Cf. Van de Kamp*, 555 U.S. at ___, 129 S.Ct. at 863 ("because better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings.").

The fundamental legal flaw in plaintiff's argument is that, as *Imbler* and this Court's *Brady* cases recognize, a *Brady* determination in a single case, whether rightly or wrongly made, is a function of individual prosecutorial discretion based on a complex set of evidentiary factors unique to that case. Thus, a policy or practice of a district attorney's office through inadequate training (unless the policy was itself illegal) cannot "actually cause[]," *City of Canton*, 489 U.S. at 391, a *Brady* violation in a single episode. Nor can it be proven under those circumstances (since a single episode is involved) that an office made "a deliberate or conscious choice," *id.* at 389 (internal quotation marks omitted), to do so.

As previously noted, public prosecutors acting in their advocacy function are different governmental actors from police officers (*see, e.g., City of Canton,* 489 U.S. at 389-391) or local legislators (*see, e.g., Owen,* 445 U.S. at 622 (1980)), a difference recognized by this Court (*see, e.g., Imbler,* 424 U.S. at 427-431; *see also Pembaur v. Cincinnati*, 475 U.S. 469 (1986)

(in another context, district attorney's illegal decision directing sheriff to forcefully enter office to execute warrant for third party witnesses, which violated Pembaur's Fourth Amendment right, was illegal municipal policy that caused injury for liability under *Monell*); and revealed in their individual role under *Brady* that makes each assistant prosecutor when determining what to disclose, and when, an independent actor from the district attorney's office, as final policymaker, at least in respect to a single episode of a *Brady* violation, negating the necessary causation between the alleged failure to train and the injury.

First, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler,* 424 U.S. at 429. A prosecutor today undergoes extensive educational training as a prelude to practicing law and afterwards is subject to continuing ethical duties, one of which is the obligation to disclose *Brady*. *See, e.g., New York Rules of Professional Conduct*, Rule 3.8 (b) (entitled "Special Responsibilities of Prosecutors and Other Government Lawyers") (effective April 1, 2009) available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf (accessed May 5, 2010); *see also, e.g., Imbler*, 424 U.S. at 427 n.25 (duty of disclosure at trial enforced by due process; after conviction "the prosecutor also is bound by the ethics of his office . . ." to disclose evidence or information "that casts doubt upon the correctness of the conviction."). The obligation to follow *Brady* requires the individual prosecutor to know the rule in

its current form today independent of office training. *See, e.g., Connick II*, 578 F.3d at 304 ("Because this case concerns the actions of licensed attorneys who have independent professional obligations to know and uphold the law, there is even more reason than in *City of Canton*. . . . not to rely on generalized statements about lack of training.").

A district attorney, the relevant final municipal policymaker in this context, can reasonably suppose that in light of their educational training and ethical obligation, his or her assistants will follow the law of *Brady* in a particular case. *Cf., e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (plurality opinion) ("Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. *It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them.*") (italics supplied). That the policymaker's assistants are licensed professionals ethically required to follow *Brady* strongly militates against a finding that a district attorney was deliberately indifferent to the rights of an accused under *Brady* or caused the injury based on a single *Brady* violation in a particular prosecution.

Indeed, the prosecutors' unique role in each prosecution as minister of justice, *see, e.g., Strickler v. Greene*, 527 U.S. 263, 281 (1999) (*Brady* "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials."), exemplified by their constitutional and ethical duty to disclose, in certain circumstances, favorable evidence distinguishes, as municipal actors, the prosecutor from the police officer. The latter's use of deadly

physical force in a single incident, the Court surmised, may result in municipal liability based on inadequate training for a single episode of such illegal use. *See City of Canton*, 489 U.S. at 390 and n.10. In this respect, the Court in *City of Canton* "simply hypothesized . . . a narrow range of circumstances," *Bryan Co.*, 520 U.S. at 409, from which a single episode could give rise to municipal liability, not necessarily that a plaintiff could "succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations . . . ." *Id.* Notably, however, each prosecutor has an individual obligation to know, and properly fulfill, the *Brady* rule in each case independent of office training, an obligation that distinguishes the police officer who has no such similar ethical obligation. Consequently, an assistant prosecutor's violation of *Brady* in a single case can result in professional discipline, on-the-job discipline or termination, and reversal of the conviction. *See, e.g., Imbler*, 424 U.S. at 429.

Second, the nature of the prosecutor's *Brady* determination also makes municipal liability against a prosecutor's office, on a failure-to-train claim for a single *Brady* violation, unsustainable. The plaintiff in such a suit "must . . . prove that the deficiency in training actually caused the [prosecutor's] indifference to the [accused]." *City of Canton*, 489 U.S. at 391. But a single violation by an individual assistant cannot result from an office policy, practice or custom when a prosecutor's *Brady* determination flows from a complex evaluation of evidence unique, and thus different, to each case. In that instance, the fault, if any, flowing from that advocacy determination necessarily lies with the individual

prosecutor who possesses the obligation to determine what, and when, to disclose.

This duty derives from the prosecutor's essential role as advocate and minister of justice in a particular prosecution, *see, e.g., Strickler*, 527 U.S. at 281, and thus, is a vital component of a prosecutor competently and ethically performing the responsibilities of his or her prosecution function. *See, e.g., A.B.A. Standards for Criminal Justice Prosecution Function*, § 3-3.11 (a)-(c) ("Disclosure of Evidence by the Prosecutor"), at 81 (3d ed. 1993) available at http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (accessed June 1, 2010). Yet, this disclosure determination is manifestly different for each case, requiring the exercise of prosecutorial judgment in the context of each case.

This is because the constitutional duty encompasses disclosure not of all evidence helpful to the defense (although ethically and in practice such evidence should be disclosed), but only that evidence which would *materially* affect the outcome. "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281; *See also, e.g., Kyles*, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy . . . ."); *United States v. Bagley*, 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."). When non-disclosed evidence is material, however, necessarily varies with the fact pattern of each case. The case-specific nature of this constitutional

obligation was captured in *Kyles*, 514 U.S. at 437, as follows:

> "While the definition of . . . materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."

That this "reasonable probability" determination is faced by virtually every prosecutor, and certainly those who remain career prosecutors, does not render the "need for more or different training . . . so obvious," *City of Canton*, 489 U.S. at 390, as to require training in all district attorney offices nationwide to avoid catastrophic municipal liability predicated on a single violation. As noted, a public prosecutor is different in this respect from other municipal actors: each is ethically obligated to follow *Brady* and its current progeny interpreting that decision. Nor is the need for training "obvious" to a district attorney as

policymaker based on misconduct in a single prosecution, as occurred here, when his or her assistant prosecutors not only are presumed to follow and apply the law, but when the decision itself is different in every case, complex and, at times, difficult. Indeed, this Court in viewing a case retrospectively has not, at times, been able to unanimously agree whether the reasonable probability standard has been satisfied by non-disclosure in a particular case. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 706 (2004) (concurring opinion in part and dissenting opinion in part of Thomas and Scalia, JJ.); *Kyles*, 514 U.S. at 456 (dissenting opinion of Scalia, Kennedy and Thomas, JJ., and Rehnquist, C.J.). This merely highlights the proposition that a district attorney's office itself should not be held financially accountable on a *Monell* failure-to-train claim based on a single *Brady* violation.

Consequently, that members of a particular district attorney's office view *Brady* determinations as, at times, "gray" or disagree whether a particular kind of evidence falls within the disclosure obligation, as plaintiff has highlighted in this case, cannot prove that a violation by one or more members of the office in a single case, although regrettable and wrong, was thus caused by an office policy of inadequate training. This is especially so when the stated policy of the district attorney's office in 1985 was to follow the law on disclosure, a policy implemented, not by formal training sessions, but on-the-job training between trial supervisors and assistants handling a particular case. Plaintiff has simply failed to show that the single violation in his case was in fact caused by a policy of inadequate training from a deliberately indifferent district attorney as final municipal policymaker.

CONCLUSION

Imbler and decisions such as *Bagley* recognize that the prosecutor's exercise of the *constitutional* obligation to disclose *material* exculpatory evidence necessarily allows the prosecutor the advocatory decision (subject to court review) to determine when specific evidence in a particular case reaches the point of materiality. Further, this Court has not constitutionally required training to fulfill this obligation, instead leaving that question to the province of individual prosecuting offices throughout the nation. *See Giglio v. United States,* 405 U.S. 150, 154 (1972) ("To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden . . . .") Ensuring that *Monell's* liability for a failure-to-train claim against a prosecuting office for violating *Brady* occurs only in limited circumstances under stringent evidentiary requirements—that the entity was the culpable moving force behind the injury as a result of office policy or custom, as opposed to the single-case misconduct of its assistants, allows the prosecutor's case-specific discretionary determination under *Brady* to continue undeterred by incurring huge entity liability if wrong in a given case; and continues to leave the scope and content of office training of prosecutors to the individual prosecuting offices themselves, not the federal courts.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-571

In the

Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney, ET AL.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR *AMICI CURIAE* FORMER FEDERAL CIVIL RIGHTS OFFICIALS AND PROSECUTORS WAN J. KIM, BILL LANN LEE, GRACE CHUNG BECKER, WILLIAM YEOMANS, JOHN R. DUNNE, STEPHEN J. POLLAK, J. STANLEY POTTINGER, JAMES P. TURNER, EDWARD S.G. DENNIS, JR., DAVID W. MARSTON, MATTHEW D. ORWIG, JOHN RATCLIFFE, AND UTTAM DHILLON IN SUPPORT OF RESPONDENT

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August 13, 2010

QUESTION PRESENTED

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

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INTEREST OF *AMICI CURIAE*[1]

Amici are a broad, bipartisan coalition of former heads of the Civil Rights Division of the Department of Justice ("DOJ") and other senior federal prosecutors. *See* Appendix, *infra*. *Amici* include former Assistant Attorneys General and Acting Assistant Attorneys General for the Civil Rights Division Wan J. Kim, Bill Lann Lee, Grace Chung Becker, William Yeomans, John R. Dunne, Stephen J. Pollak, J. Stanley Pottinger, and James P. Turner; Assistant Attorney General for the Criminal Division Edward S.G. Dennis, Jr.; United States Attorneys David W. Marston, Matthew D. Orwig, and John Ratcliffe; and Associate Deputy Attorney General Uttam Dhillon. *Amici* have extensive experience in making the difficult judgments required of prosecutors by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). They recognize the important role that section 1983 claims play in encouraging all public officials, including prosecutors, to remain cognizant of their obligations to discharge the authority of the State in a way that respects the constitutional freedoms of the citizens they serve.

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[1] The parties have consented to the filing of this brief by filing consent letters with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Based on their experience at DOJ in bringing and supervising federal prosecutions, *amici* have a deep respect for *Brady* and its contribution to public confidence in the fairness of our criminal justice system. *Amici* also understand that complying with *Brady* and its progeny is not always simple or self-evident. *Amici* know first-hand that prosecutors are professionals who take their duties seriously, but that does not eliminate the need for training on how to comply with *Brady*.

Amici's interest is in ensuring that section 1983 realizes its promise as a remedy for conduct that causes constitutional violations and that the balance of interests carefully struck by this Court's precedents is preserved. The Court's precedent with respect to section 1983 failure-to-train claims promotes respect for the rule of law by holding municipal entities to account when they demonstrate deliberate indifference to constitutional rights and cause constitutional violations. Although successful failure-to-train claims are, and should be, rare, their continued availability strengthens public respect for the criminal justice system, particularly against criticism that the system is indifferent (if not hostile) to the rights of those charged, especially those wrongly charged, with criminal acts.

INTRODUCTION AND SUMMARY OF ARGUMENT

If compliance with *Brady* and its progeny were simple and universal, perhaps there would be no need for either training or failure-to-train liability. Compliance, however, is neither simple nor

universal. Compliance often entails difficult judgment calls about what evidence is exculpatory or material, and the resource constraints, time pressures, and other stresses often felt by prosecutors in the real world add to the difficulty. Those judgment calls require informed judgment. *Brady* compliance is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted.

DOJ has long had formal policies to ensure *Brady* compliance. Nonetheless, federal prosecutors recently have been involved in several high-profile *Brady* violations. In response, DOJ has redoubled its efforts to ensure compliance. It has undertaken a wholesale revision and enhancement of its training on *Brady* compliance. DOJ's recent actions demonstrate that it understands the importance of such training. It certainly demonstrates beyond doubt that *Brady* compliance is not something that can simply be taken for granted or be substantially achieved without training. Because States and municipalities have the same constitutional obligations, they surely have no less a need to provide guidance to their prosecutors to meet those obligations. It is simple common sense to recognize that, under some circumstances, the need for some form of training on complying with *Brady* may be obvious. While a small district attorney's office may not have the need or financial wherewithal to replicate DOJ's more extensive training, some guidance is necessary. It need not be expensive or elaborate, but *Brady* is too important to be left to the untutored instincts of new prosecutors. Where

a district attorney's office disregards such an obvious need, it is guilty of deliberate indifference and thus meets the standard of culpability that this Court has set for municipal liability. And where a deliberately indifferent failure to train actually causes a *Brady* violation in a particular case, there is no basis in the text of section 1983 to let the municipality escape liability.

Respondent has a statutory cause of action. Congress created his section 1983 claim against petitioners for "caus[ing]" the deprivation of his liberty. Upholding that claim does not require recognizing any new or expanded constitutional right or species of liability. It simply requires applying the plain text that Congress enacted and adhering to settled and unchallenged precedents governing the deliberate indifference standard and the requirement of actual causation. There is no basis in law or logic for petitioners' suggested rule that there can be no deliberate indifference or causation absent a history of past violations, and the Court should decline to adopt any such artificial and atextual rule.

District attorney's offices may adopt widely varying approaches to *Brady* compliance—including approaches that are far from ideal—without descending into deliberate indifference. And particular *Brady* violations may turn out to be attributable to factors other than a lack of training. But respondent proved his claim under this Court's standards.

ARGUMENT

I. DOJ's Experience Shows The Need To Maintain Meaningful Recourse Where Municipalities Improperly Fail To Train Prosecutors To Comply With *Brady*.

Brady compliance is a recurrent issue at every level of government. Federal prosecutors frequently face *Brady* issues as part of the numerous criminal prosecutions conducted by DOJ every year. For that reason DOJ has long had formal criminal discovery policies and training on *Brady* compliance. Federal prosecutors are justly thought of as the "gold standard" of prosecutorial professionalism, and yet lapses occur. Recent high-profile *Brady* violations by federal prosecutors have caused DOJ to redouble its efforts to provide adequate *Brady* training and guidance. On January 4, 2010, DOJ released three memoranda detailing those efforts.[2] The federal experience—and DOJ's swift response to enhance its training—should inform the issues in this case where

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[2] *See* Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-memo.html ("Summary Memo"); Memorandum from David W. Ogden, Deputy Attorney General, to Heads of Department Litigating Components Handling Criminal Matters, All United States Attorneys (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-to-usas-component-heads.html ("Policy Memo"); Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html ("Guidance Memo").

constitutional violations resulted from petitioners' abject failure to train prosecutors at all.

A. DOJ's Experience Shows That *Brady* Compliance Requires Training And That Failing To Provide Appropriate Training Causes Violations.

1. DOJ has long recognized that understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident. As a result, DOJ has recognized the need for official guidance on *Brady* compliance. For example, in December 1996, the Attorney General announced a policy regarding the "Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('*Giglio* Policy')." U.S. Attorney's Manual § 9-5.100. That policy set forth detailed procedures for identifying and disclosing impeachment information.

In 2006, the Attorney General amended the *Giglio* policy to reflect DOJ's proactive approach to the disclosure of exculpatory and impeachment information. The United States Attorney's Manual ("USAM") now requires federal prosecutors to go beyond their *Brady* and *Giglio* obligations to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." *Id.* § 9-5.001(B)(1) (updated Oct. 2008). The revision also reflects DOJ's belief that training in this area is important: it encouraged prosecutors "to undertake periodic training concerning the government's disclosure obligation and the

emerging case law surrounding that obligation." *Id.* § 9-5.001(E) (2006).

Of course, the USAM reflects only some of the guidance and training provided to federal prosecutors. Local United States Attorney's Offices ("USAOs") bear much of the burden to ensure compliance with discovery obligations in particular cases. Indeed, even before the changes adopted in January 2010, 90 percent of USAOs had their own standardized discovery policies and practices, some of which went well beyond *Brady*. Policy Memo 2; *see also United States v. Muehlbauer*, 892 F.2d 664, 669 (7th Cir. 1990) (noting "the 'open file' policy followed by the United States Attorney's office in the Eastern District of Wisconsin").

2. Despite the fact that DOJ has formally addressed compliance with *Brady* for many years, *Brady* violations have still occurred. In 2009 alone, federal courts confronted several notable instances. *See United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); *United States v. W.R. Grace*, No. 05-CR-07, slip op. at 6-7 (D. Mont. Apr. 28, 2009); *United States v. Stevens*, No. 08-231 (D.D.C. April 7, 2009) (Dkt. No. 374); *United States v. Jones*, 620 F. Supp. 2d 163, 183 (D. Mass. 2009) ("*Jones I*"). These "[r]ecent, prominent examples of cases involving *Brady* violations" have served as a stark reminder that compliance cannot be taken for granted and training remains critical. *United States v. Jones*, 686 F. Supp. 2d 147, 151 n.2 (D. Mass. 2010).

Several judges tied these violations to the need for more training. At the American Bar

Association's 2009 Annual Meeting, Judge Paul Friedman of the District Court of the District of Columbia bluntly stated, "I don't think prosecutors understand their *Brady* obligations." Barbara Grzincic, *Corruption Trials, Chicago-style*, The Daily Record (July 30, 2009), *available at* http://mddailyrecord.com/ontherecord/2009/07/30/corruption-trials-chicago-style/ (last visited Aug. 5, 2010). Chief Judge Mark Wolf of the District of Massachusetts wrote that the training provided to one federal prosecutor who had violated *Brady* was, "at least with regard to discovery . . . obviously inadequate to serve its intended purpose." *Jones I*, 620 F. Supp. 2d at 183. Stating that "it is insufficient to rely on Department of Justice training programs for prosecutors," Chief Judge Wolf announced that his court would "have a program presented on discovery in criminal cases involving judges, defense lawyers, and prosecutors." *Id.* at 167.

Federal prosecutors also admitted *Brady* violations in the prosecution of the late U.S. Senator Ted Stevens. Those violations captured the public spotlight, and the Attorney General took the extraordinary step of requesting dismissal of the case after a conviction had been obtained. Judge Emmet Sullivan appointed an independent investigator to determine the full extent of misfeasance. Speaking from the bench, Judge Sullivan "encourage[d] the Attorney General, for whom I have the highest regard, to require *Brady* training for new and veteran, experienced prosecutors throughout the country . . . ." *Stevens*, No. 08-231 (D.D.C. April 7, 2009) (Dkt. No. 374).

3. These concerns prompted an immediate response from Attorney General Eric Holder. In a televised interview, just one day after Judge Sullivan's remarks, the Attorney General stated that "I'll make sure that the people of this department are adequately trained. That they have adequate resources. And try to make sure that we return to the traditions that have made this department great—and will make it great again."[3] The Attorney General issued a press release days later stating that DOJ would "[p]rovid[e] supplemental training to federal prosecutors throughout the Department on their discovery obligations in criminal cases." Press Release, Department of Justice (Apr. 14, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-opa-338.html. The press release also announced a working group to study discovery practices and related training efforts.

The January 2010 memoranda revealed the results of the working group's efforts. Signed by Deputy Attorney General David Ogden, the memoranda set forth a comprehensive, multi-part approach designed to provide federal prosecutors with tools to address their discovery obligations. The new guidance was "intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences

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[3] *CBS Evening News with Katie Couric* (CBS television broadcast, April 8, 2009), *available at* http://www.cbsnews.com/stories/2009/04/08/eveningnews/main4930388_page4.shtml.

adverse to the Department's pursuit of justice." Guidance Memo 1. To that end, the third memorandum set forth 11 pages of criminal discovery guidance for federal prosecutors. *See generally* Guidance Memo.

The memoranda also announced new training and tools. Building on its pre-existing training program, DOJ now requires mandatory *Brady* training for new Assistant United States Attorneys ("AUSAs"). USAM § 9-5.001(E). Veteran AUSAs must participate in annual training thereafter. *Id.* Paralegals and law enforcement agents will also undergo a training program. Summary Memo 3.

In reality, though, training occurs continuously. The new policy requires USAOs to appoint an expert on criminal discovery for purposes of advising prosecutors on individual cases. *Id.* Even before the January 2010 memoranda, these discovery coordinators attended a "Train the Trainer" conference in October 2009. *Id.* The discovery coordinators will not only provide annual training but will also be available on-location throughout the year to advise fellow prosecutors. *Id.* At DOJ headquarters, a new position will be created to oversee all of these efforts. *Id.* at 4.

Every USAO must also adopt or update formal criminal discovery policies. *Id.* The policies must be comprehensive and address recurring discovery issues:

> the timing of disclosures; disclosure of reports of interview for testifying or non-testifying witnesses; providing disclosure beyond the

> requirements of Fed. R. Crim. P. 16 and 26.2, *Brady*, *Giglio*, the Jencks Act, and USAM §9-5.001; the scope of the 'prosecution team' in national security cases or cases involving regulatory agencies, parallel proceedings, or task force investigations; storing and reviewing substantive, case-related communications such as email; obtaining *Giglio* information from local law enforcement officers; disclosure questions related to trial preparation witness interviews; disclosure of agent notes; and maintaining a record of disclosures. Policy Memo 2.

In addition to all this training, DOJ plans to create an online directory of discovery resources and a "Handbook on Discovery and Case Management" to be used as "a one-stop resource that addresses various topics relating to discovery obligations." Summary Memo 3. DOJ also plans to address new ways to catalog electronically stored information obtained and used in criminal investigations. *Id.* at 4. And finally, it will create a pilot case management project to address best practices in managing a case, including discovery issues. *Id.*

B. The Emphasis On Training At The Federal Level Underscores The Need For Training At The State And Local Level.

Courts are plainly concerned that inadequate training has caused and will continue to cause *Brady* violations. DOJ has shown that it takes those concerns seriously and believes comprehensive training and guidance is needed.

The efforts by DOJ underscore the importance of similar training for state and local prosecutors. While few local prosecutors have the resources to replicate all of DOJ's efforts, DOJ's extensive efforts with already highly trained federal prosecutors demonstrates beyond cavil that some guidance is necessary. *Brady* compliance is not something that any law school graduate can simply intuit. Training, guidance, and the office's general attitudes toward *Brady* obligations play a critical role in ensuring compliance with constitutional obligations.

1. Federal prosecutor jobs are prestigious and typically attract lawyers who are highly capable. Federal prosecutors also have the benefit of a high degree of uniformity in their approach to prosecutions because of the relatively centralized nature of DOJ. And most federal prosecutors are experienced practitioners even before they become federal prosecutors. Despite these advantages, *Brady* violations sometimes occur. Indeed, the serious violations in the *Stevens* case demonstrate that training remains necessary even for the elite federal prosecutors who specialize in public integrity matters.

States and municipalities undoubtedly attract high-quality lawyers as well, but they lack some of the resources and advantages of DOJ. For example, no central agency sets minimal training standards for local prosecutors across the nation. No centralized authority provides the kind of written guidance and practical resources that DOJ offers. And there is no centralized authority for local district attorney's offices that has power to

adopt the sweeping changes made by DOJ. Of course, the lack of these centralized resources means that local offices cannot be expected to replicate DOJ's extensive training efforts. But they equally underscore the if-anything greater need for some training and some guidance with respect to *Brady* obligations. Moreover, the availability of training videotapes and internet resources makes clear that training need not be expensive and that the resource-constraint objection is a red herring.

Petitioners' suggestion that no training is necessary because prosecutors are educated professionals blinks reality. Federal prosecutors too "must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness standards." Pet. Br. 27-28. That has not kept *Brady* violations in federal cases from becoming high-profile national news. And DOJ's response was not to tighten hiring standards and hope for the best, or to ask law schools or state bars to deal with the problem. Rather, it was to undertake a top-to-bottom re-evaluation of the training and guidance necessary to aid prosecutors in meeting their *Brady* obligations.

It was simple common sense for DOJ to recognize that its prosecutors were committing *Brady* violations and it was incumbent on DOJ to do something about it—not to close its eyes to the problem or hope that someone else would take care of it. And it is simple logic to recognize that, where a municipality knows that its prosecutors need training to comply with *Brady*, the municipality may be culpable if it closes its eyes to the problem.

2. To be sure, no uniform approach to *Brady* training or uniform system to ensure *Brady* compliance is required by the Constitution. Indeed, strictly speaking the Constitution does not require *Brady* training in any form. *See* pp. 21-22, *infra*. Nor is there a one-size-fits-all approach appropriate to the varied conditions in local prosecutors' offices around the nation.[4] Even individual USAOs must adapt DOJ's policies to comport with local practice. Policy Memo 2. And *Brady* training need not be as elaborate as DOJ's to provide meaningful guidance that can help to reduce, if not eliminate, *Brady* violations.

Although the varied conditions in prosecutors' offices around the nation make it inappropriate to elevate a particular approach to ensuring compliance with *Brady*, no variance in conditions can obscure the fundamental point that compliance with *Brady* is a constitutional requirement that every district attorney's office must acknowledge. The federal system allows localities to be laboratories for the best ways to achieve compliance with *Brady*. But section 1983 provides a remedy for constitutional violations that occur in

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[4] Local conditions may make the need for *Brady* training particularly acute. For examples, prosecutors in a district where the police officers may be affirmatively suppressing exculpatory evidence or doctoring police files, as reportedly is the case in New Orleans, may need specialized guidance. *See* Campbell Robertson, *New Orleans Asks U.S. To Help Police Department*, N.Y. Times (May 5, 2010) (quoting New Orleans Mayor Mitch Landrieu as stating "'We have a systemic failure'" and "inviting the [U.S.] Justice Department to help restructure the troubled New Orleans Police Department").

municipalities that are deliberately indifferent to such compliance. The demanding nature of the deliberate indifference standard may mean that such cases will be rare. The need to prove that the municipality's deliberate indifference caused the violation in a particular case may mean that it is rarer still for a municipality to be liable under section 1983. But where a municipality provides absolutely no guidance on *Brady* compliance, under circumstances where that failure reflects deliberate indifference to the rights of the accused, liability is appropriate. Section 1983 was enacted to ensure that local variation did not become the cause of unremedied constitutional violations. The existence of failure-to-train liability under section 1983 in appropriate cases plays a key role in encouraging localities to adopt and refine practices designed to produce compliance. Abolishing such liability would encourage municipalities to give short shrift to *Brady* compliance—or worse.

II. The Potential For Prosecutions Under 18 U.S.C. § 242 Does Not Obviate The Need For Training To Comply With *Brady*.

Municipal liability for failure to train is an essential bulwark for encouraging *Brady* compliance. Prosecutors themselves are immune from suit for *Brady* violations under section 1983 and the Court's absolute immunity precedents. They are not similarly immune from prosecution under 18 U.S.C. § 242, which authorizes fines and imprisonment for anyone who "willfully subjects any person" to a deprivation of any constitutional rights. Practice shows, however, that charges are rarely brought against prosecutors under that

statute—and almost never for *Brady* violations. To ensure careful compliance with *Brady*, there is thus no substitute for municipal liability, including for failure to train when that failure reflects deliberate indifference and causes a constitutional violation.

Even though prosecutors may have absolute immunity from civil liability for acts within their role as advocate, that immunity does not "place them beyond the reach of the criminal law." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976). In their roles as federal prosecutors or high-level officials in the Civil Rights Division, which has enforcement responsibility for criminal civil rights violations, many *amici* had responsibility for prosecutions under 18 U.S.C. § 242, "the criminal analog of § 1983." *Imbler*, 424 U.S. at 429. Accordingly, *amici* have first-hand knowledge that while section 242 is a critically important part of the federal civil rights enforcement arsenal, it is hardly a sufficient mechanism to ensure that prosecutors comply with *Brady*.

Charges against prosecutors under section 242 are extremely rare. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 71 (suggesting that only one prosecutor has ever been convicted under section 242). They are rarer still for *Brady* violations. Indeed, it appears that only one prosecutor has ever been charged under the statute for a *Brady* violation. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 81 n.291 (2002) (citation omitted).

The infrequency of section 242 charges alone suggests that it is not a promising vehicle for addressing *Brady* violations. More fundamentally, the small number of prosecutions is a function of the statute's narrow ambit: section 242 applies only to *intentional* constitutional infractions. Prosecutors who knowingly violate *Brady* may face a risk of potential prosecution (even if the evidence of section 242's historical use suggests that such a risk is more theoretical than real). But section 242 is categorically inapplicable to *Brady* violations that are caused by prosecutors' failure to understand their obligations or to pay sufficient attention to them.

Section 242 is thus incapable of addressing the root of the problem recently identified by DOJ and emphasized by many judges: many prosecutors do not fully understand their obligations under *Brady* or do not pay sufficient heed to compliance. Prosecutors who misapply *Brady* in ignorance or who make an incorrect judgment call in a gray area cannot be prosecuted under section 242. Even prosecutors who put a low priority on compliance and violate *Brady* because of an excess of prosecutorial zeal cannot be prosecuted under section 242. Evil-minded prosecutors who commit willful *Brady* violations are thankfully rare indeed. The vast majority of *Brady* violations are inadvertent, not willful, and training and guidance on how to comply are the natural way for prosecutors' offices to prevent such violations. Unlike section 242, the failure-to-train cause of action cuts directly to the heart of the problem and can help remedy it.

Preserving the possibility of municipal liability is especially important because there is no other remedy that could provide the proper incentives to train prosecutors to avoid *Brady* violations. With section 242 almost entirely inapplicable and prosecutors personally immune from individual-capacity civil suit, *see Imbler*, 424 U.S. at 427, prosecutors face no threat of legal consequences for depriving criminal defendants of their rights under *Brady*. Even the States previously recognized that municipal liability was the one remaining backstop. Brief for the States of Kansas *et al.*, at 20-22, *Van de Kamp v. Goldstein*, No. 07-854 (U.S. July 7, 2008). Eliminating that last remaining backstop cannot help but foster unhealthy incentives, and will make *Brady* violations against the innocent the one constitutional violation without an effective remedy. Nothing in the text of section 1983, enacted by Congress under the Fourteenth Amendment's Enforcement Clause authority, reflects any intent to allow *Brady* violations to go completely unremedied in the civil system.

The point, of course, is not to find creative ways to punish prosecutors. It is to ensure that appropriate incentives exist to encourage training that produces *Brady* compliance and to prevent violations, such as the one in this case that almost cost an innocent man his life. It is critical that the law give district attorney's offices an incentive to see to it that their prosecutors understand and comply with *Brady*.

III. A Proper Focus On The Text Of Section 1983 Supports The Judgment Below.

1. Even though section 1983 is familiar, its text bears quoting because this case at bottom involves statutory interpretation, and section 1983's text speaks directly to the question presented. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or *causes to be subjected*, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . . 42 U.S.C. § 1983 (emphasis added).

a. This statutory text makes crystal clear that a person, which includes a municipality, *see Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 692 (1978), who causes someone to be subjected to a constitutional violation is liable for the injury that the person caused. To be sure, the causation required by section 1983 is demanding. Municipalities are not liable where they "cause[]" a citizen to be subjected to a deprivation of his rights only in the attenuated sense of employing a person who commits the deprivation. Instead of the sweeping vicarious liability imposed by ordinary state common law, municipalities are liable under section 1983 for "caus[ing]" a deprivation only where the municipality itself acts culpably. *See City of Canton v. Harris*, 489 U.S. 378, 387 (1989). But it is equally settled that, as section 1983's text makes clear, liability extends to policies that cause

constitutional violations, even though the "policy" itself is *not* unconstitutional. *Id.* at 386-87. That theory of municipal liability, moreover, has been expressly applied to a claim that the municipality caused a deprivation by failing to train its employees. *Id.* at 387. Although the text of section 1983 does not specify a standard of scienter, the municipality's "degree of fault" required before a failure to train may support liability has been set at "deliberate indifference." *Id.* at 388. Finally, it is common ground that, to take advantage of section 1983's claim for "caus[ing]" a deprivation, a plaintiff must prove that a municipality's failure to train "actually caused" the particular deprivation that injured him. *Id.* at 391; *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997) (plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights").

All of this is now black-letter law that no party asks this Court to revisit. Nor is there any dispute that respondent was "subjected ... to the deprivation of [a] right[] ... secured by the Constitution," 42 U.S.C. § 1983, namely, the right to receive material exculpatory evidence in the prosecution's possession so that he would not be deprived of his liberty without due process of law. Because the underlying *Brady* violation is undisputed, this case does not present any question about the scope of the *Brady* right. Given the jury's finding of causation, the statutory case for liability seems clear, and does not turn on the nature or scope of the underlying constitutional violation.

b. Indeed, this case does not present any constitutional question at all. As the case comes to this Court, there is no claim that the district attorney's office had an unconstitutional policy of refusing to comply with *Brady*. *Thompson v. Connick*, 553 F.3d 836, 847 (5th Cir. 2008). There is no claim that the office's failure to train its prosecutors was itself unconstitutional or that there is any such thing as a freestanding constitutional obligation to provide *Brady* training. But that does not mean that Congress was indifferent to municipalities that cause *Brady* violations. This Court has already explained that a municipality's liability poses a statutory question that is distinct from whether there has been an underlying constitutional violation: "the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred." *City of Canton*, 489 U.S. at 389 n.8. That, in turn, is simply a function of the fact that Congress chose, in a classic use of its Enforcement Clause authority, to go beyond imposing liability on persons who commit actual constitutional violations to extend liability also to persons who cause other persons to do so.

Accordingly, the Court need not fear that affirming the judgment below will entail or lead to the recognition of a new constitutional right to *Brady* training (or any other new or expanded constitutional right). And as Justice O'Connor, joined by Justice Scalia and Justice Kennedy, explained in *City of Canton*, the requirements of

deliberate indifference and actual causation will ensure that courts do not "impose 'prophylactic' duties on municipal governments only *remotely* connected to underlying constitutional requirements themselves." *Id.* at 395 (opinion concurring in part and dissenting in part) (emphasis added). But while neither the Constitution nor section 1983 requires *Brady* training, section 1983 does provide compensation for someone who can prove that an improper failure to provide *Brady* training or guidance caused constitutional injury. Section 1983 makes that much clear.

2. As explained above, the basic principles governing municipal liability, failure-to-train claims, and the reach of section 1983 are settled, and petitioners do not ask the Court to revisit them—at least not openly. Instead of arguing that deliberate indifference is an insufficiently high "degree of fault" for a failure-to-train claim and shouldering the burden of asking the Court to overrule *City of Canton*, petitioners seek a rule that a municipality can never be deliberately indifferent to the need to train its prosecutors to comply with *Brady* unless its own prosecutors have a history of violating *Brady*. Petitioners' suggested rule has no basis in the text of section 1983, common sense, or sound policy.[5]

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[5] It is also unclear how petitioners' proposed rule would aid their cause. As respondent has noted, petitioners did have a history of *Brady* violations. Resp. Br. 15-16, 37.

a. Fidelity to the statute that Congress enacted, and to this Court's precedents, precludes creation of a bright-line rule about how many *Brady* violations must have occurred to support a finding of municipal liability for causing a constitutional violation. Section 1983 asks whether a municipality caused the *Brady* violation in the case at hand. Whether the municipality itself caused a particular violation may depend on the nature of the violation, the identity of the person or persons who directly committed it, and the reasons why they committed it. But the causation question does not depend on whether there is a history of prior violations. As for the deliberate indifference requirement adopted by this Court, this Court has never adopted the kind of bright-line test requiring prior violations that petitioners propose, and indeed *City of Canton* is to the contrary. *See* pp. 27-28, *infra*. To be sure, a history of *Brady* violations that went unaddressed would be powerful circumstantial evidence of deliberate indifference for failing to provide training. But it is just that: one particular form of circumstantial evidence of deliberate indifference. It is not the exclusive means of proving deliberate indifference. And certainly the text of the statute provides no basis for a stand-alone requirement of proving prior violations.

There are any number of circumstances in which deliberate indifference could be shown without resort to evidence of prior violations within the particular municipality. To begin with only the most obvious example, there could be a case where there is direct evidence of deliberate indifference to

Brady violations, such as a chief prosecutor who proclaimed that *Brady* was an issue for the courts and no concern of the prosecutor.

But even absent hopefully rare direct evidence, there are a number of other circumstances in which deliberate indifference could be proven without a pattern. Take, for example, an office governed by a policy of disclosing *Brady* materials and not a scintilla more. Such a policy, if backed by a complete lack of training about *Brady* and a clear indication that the only way a line prosecutor could get in trouble is by overdisclosing, could prove deliberate indifference.

Consider as another alternative a district attorney's office that previously followed an open-file policy that provided more disclosure than required by *Brady* (either broadly or as to a particular kind of evidence). Such a policy could both avoid *Brady* violations and obviate the need for training on compliance with *Brady*.[6] If the office then abandons the open-file policy, its prosecutors will need to start complying with *Brady* itself. But they may not know how to do so because the old policy made it unnecessary to focus on what *Brady* requires. Those circumstances may make it sufficiently clear that *Brady* training is needed that the district attorney could be guilty of deliberate

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[6] Petitioners argued below that the district attorney's office had just such a policy, under which all lab reports were produced regardless of whether disclosure was technically required by *Brady*. The jury found that petitioners did not have such a policy. *See, e.g., Thompson v. Connick*, 578 F.3d 293, 312 (5th Cir. 2009) (opinion of Prado, J.).

indifference if he opts not to provide any such training.

Or consider an office that avoided violations in the past by staffing cases so that new prosecutors untrained in *Brady* compliance worked closely with well-trained prosecutors. The untrained prosecutors might have come close to committing *Brady* violations only to be rescued by the supervisory prosecutors before any actual violations occurred. If the district attorney knows about those near-misses, he may be deliberately indifferent if he changes the office's staffing so that the untrained prosecutors work alone on prosecutions and he provides them no training to enable them to comply on their own.

Conversely, there may not be an obvious need to provide *Brady* training, or the kind of *Brady* training whose absence caused the violation at issue, even where there *is* a history of violations. For example, if the past violations concerned *Giglio* issues, the district attorney may not be guilty of deliberate indifference if he opts not to provide training on non-*Giglio* aspects of compliance. Similarly, a history of violations in the distant past may not make it obvious that there is a present need for training.

The point is that whether a given failure to train reflects deliberate indifference is a fact-intensive question that will depend on many varied factors. The number of past *Brady* violations may be relevant circumstantial evidence, but it is certainly not dispositive. There may be other, more probative circumstantial or even direct evidence of

deliberate indifference. It would be highly anomalous for the law to permit reliance on circumstantial evidence only, but that would be the effect of petitioners' suggested rule that deliberate indifference can be shown only through an inference based on the fact of past violations. The Court has moved away from requirements of proffering direct evidence because of the general fungibility of direct and circumstantial evidence. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence'" (citation omitted)). But it would be a perverse rule indeed that elevated a particular form of circumstantial evidence over all other means of proving deliberate indifference.

In short, because there is no one exclusive way to demonstrate "deliberate indifference," petitioners' proposed rule cannot be understood as a mere gloss on this Court's precedents. To the contrary, what petitioners seek is an atextual requirement of showing a past violation to be grafted onto section 1983. But section 1983 provides a remedy for conduct that is either unconstitutional or caused a constitutional violation. Its focus is on the constitutional violation that caused the plaintiff's injury, not on past violations that may have injured absent third parties. In the end, the surest guide to the correct answer in this section 1983 case is the text of section 1983. That text provides no support for petitioners' novel requirement that a current victim prove a past violation to a different person before

recovery is permitted. In fact, when Congress wants to create causes of action that depend on showing a pattern-and-practice, it knows how to do so and does it expressly. *See* 42 U.S.C. § 14141.

b. Petitioners' position that a history of past violations is necessary is also contrary to *City of Canton* and certainly draws no support from that decision. The opinion of the Court in *City of Canton* did not suggest any such requirement. To the contrary, the Court explained that a city "can reasonably be said to have been deliberately indifferent to the need" for training if it assigns employees duties that raise an obvious risk of constitutional violations, with an obvious need for training to mitigate that risk, and does not provide proper training. 489 U.S. at 390. Far from suggesting that deliberate indifference requires a past violation, the Court cited an example that did *not* involve a past violation: a city's arming its police officers so they can arrest fleeing felons, but without training the officers "in the constitutional limitations on the use of deadly force." *Id.* at 390 n.10. The Court certainly did not suggest that a city could not be found deliberately indifferent unless one of its own armed-but-untrained officers had previously improperly shot a suspect.

Petitioners rely heavily on Justice O'Connor's separate opinion in *Canton*, suggesting that Justice O'Connor rejected single-incident failure-to-train liability. *See* Pet. Br. 21, 41, 47 n.22, 60. Petitioners are wrong. Justice O'Connor's concurrence expressly identified two different bases for a finding that a municipality was deliberately indifferent in failing to train. *City of Canton*, 489

U.S. at 396 ("In my view, it could be shown that the need for training was obvious in one of two ways.").[7] The second of those two ways—the one petitioners cite, Pet. Br. 47 n.22—involves a "pattern" of violations, but the first does not. "First," Justice O'Connor explained, "a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." 489 U.S. at 396. Justice O'Connor's juxtaposition of this basis with her second alternative makes crystal clear that the concurrence does not support a rigid rule that past violations are required. *See id.* at 397 ("Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice . . . .").[8]

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[7] Justice O'Connor concurred in the Court's adoption and articulation of the deliberate indifference standard for failure-to-train liability and its conclusion that the respondent had not satisfied that standard. Justice O'Connor's opinion dissented only on the question whether the respondent should be given a new opportunity on remand to try to satisfy that standard. *See id.* at 394.

[8] Petitioners fare no better in their heavy reliance on *Bryan County*. Petitioners never acknowledge that this Court limited its consideration of *Bryan County* to the question of liability for the hiring of the deputy sheriff, in express distinction to the question of liability for deliberate

c. The rule sought by petitioners is foreclosed by the statutory text and this Court's precedents. It is also profoundly unattractive as a matter of policy. Petitioners' position amounts to the contention that a municipality should get one free *Brady* violation before section 1983 liability can be considered. *Cf. Batson v. Kentucky*, 476 U.S. 79, 92, 95 (1986) (rejecting any requirement for establishing an equal protection violation that defendants provide "proof of repeated striking of blacks over a number of cases" in favor of rule permitting a defendant to "make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*" (emphasis in the original)). *Brady* is too important to the fair administration of the criminal justice system—and to public confidence in the fairness of that system—to write off violations in such a manner.

Moreover, the "one free violation" approach would threaten to mean multiple free violations in practice. The nature of a *Brady* violation is that the defendant is unaware that exculpatory information has not been disclosed. Sometimes the

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indifference to the need for training. The jury had found the county liable on both grounds, but the court of appeals "did not address the jury's determination of county liability based on inadequate training," and so this Court stated that it would not address that issue either. *See* 520 U.S. at 402. Rather than imposing new limits on failure-to-train cases, the Court distinguished the inadequate screening claim before it from failure-to-train claims: "The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive." *Id.* at 409.

violation eventually comes to light, whether shortly after trial as in the Senator Stevens prosecution, many years later as in last Term's *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (No. 08-1065), or just in time to save an innocent man's life as in this case. But in other instances, a *Brady* violation may never come to light. The *Brady* violations that become public may well represent only a fraction of the number of actual *Brady* violations. This Court did not suggest in *City of Canton* that a city should be allowed one free shooting before the need to ensure that its police officers are trained in the constitutional use of deadly force could be recognized. *See* 489 U.S. at 390 & n.10. It would be equally wrong to accept petitioners' request for one free *Brady* violation.

Petitioners' proposed rule is just as unattractive when viewed from the perspective of the section 1983 plaintiff. Petitioners would eventually require a current victim of a constitutional violation to prove that some absent third party suffered a prior constitutional violation. Such a requirement invites questions of the proper division of labor between judge and jury, how the prior *Brady* violation is to be proved, and whether there are temporal or subject-matter limits on prior violations. Does it matter, for example, if the predicate violation occurred under the prior administration or was committed by a line prosecutor who has moved on? Needless to say, courts would need to confront those difficult questions without the barest hint of guidance from the statutory text. A general requirement of demonstrating deliberate indifference ameliorates

these questions or avoids them entirely. And precisely because petitioners' proposed rule would deny compensation to victims of *Brady* violations until a pattern has been established, no individual would have an incentive to file suit to establish the predicate violation in the first place.

3. Ultimately, artificial rules about past violations distract from the question posed by Congress in section 1983: did a municipality's failure to train its prosecutors to comply with *Brady* cause the violation at issue? If so, and if the municipality's failure to train reflected deliberate indifference to defendants' constitutional rights under the circumstances, then the cause of action provided by Congress applies. It may be difficult to prove the elements of a failure-to-train claim based on a single violation. Indeed, in light of recent case law, it may be difficult even to plead such a claim sufficiently. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). But where a plaintiff can do so, this Court has no warrant to abolish this statutory cause of action as petitioners seek.

The jury permissibly found deliberate indifference and causation here. At the time Thompson was convicted, the district attorney's office had failed to train its prosecutors at all regarding *Brady*. *See* JA27. Maybe the absence of formal, classroom-type training could have been excused if the office had instead implemented practice-based safeguards such as having knowledgeable supervisors—with a proper *Brady* understanding—monitor or supervise prosecutors with respect to *Brady* compliance. But the office did not do that either, given the testimony

revealing the senior lawyers' flawed understanding of *Brady*. Maybe even the absence of such case-focused practical safeguards would not have mattered if the office's prosecutors had been knowledgeable and experienced individually about how to comply with *Brady*, but many were just out of law school. *See* JA172. Maybe none of this would have been a problem if the office had distributed effective written guidance and directed prosecutors to study and implement it, but the office did not have an accurate printed manual that prosecutors could turn to for self-training. Indeed, the only evidence even offered by petitioners was that any *Brady* guidance had been "codified" in the office's remarkably inaccurate 1987 office handbook. *See* JA704. Finally, maybe even the complete lack of mechanisms to ensure compliance with *Brady* would not have supported liability if the office had adopted an open-file policy that sidestepped *Brady* gray areas by voluntarily providing more disclosure than constitutionally required. But the office did not do that either. To the contrary, the office had a policy of presumptive non-disclosure, which left its untrained prosecutors not only to fend for themselves in trying to ascertain their *Brady* obligations, but to do so against the backdrop of a policy that disfavored disclosure.

Petitioners devote much of their brief to rearguing the evidence on these points, but they provide no basis for this Court to second-guess the jury's resolution of evidentiary disputes. Under the applicable standard of review, it is no exaggeration to say that the district attorney's office did *nothing*

to attempt to ensure that its prosecutors complied with *Brady*. Yet the district attorney obviously knew that the office's prosecutors would face situations that would require understanding and complying with *Brady*. On this remarkable record, it should be uncontroversial to reiterate that a failure to train can rise to the level of deliberate indifference to an obvious risk of constitutional deprivations.

Nor is there a proper basis for this Court to set aside the jury's resolution of the causation question. Petitioners seemingly argue that the jury was required to find that the *Brady* violation here was intentional and malicious and thus to infer that no type or amount of training would have prevented it. Neither step in this argument is correct. First, there were evidentiary disputes about the circumstances surrounding the *Brady* violation, including which prosecutors possessed, saw, or knew about the suppressed lab report or its significance. Even if the jury were required to accept the hearsay account that Deegan willfully suppressed the report, it would not follow that the jury also had to find that the other prosecutors conspired with Deegan.

In any event, even assuming *arguendo* that the violation was intentional on the part of all the prosecutors, it would not follow that the violation could not have been caused by a failure to train. Training on *Brady* compliance aims to do more than simply inform prosecutors about what evidence is material and exculpatory under what circumstances so that prosecutors can make the sometimes-difficult substantive judgments required

by *Brady*. Training may also aim to impress upon prosecutors that it is important to comply with *Brady* because it is the law and because it is necessary to the fundamental fairness of the criminal justice system—and, if that is not sufficient, also because the office will find out if a prosecutor fails to comply and will take appropriate action. Because of the district attorney's office's abject failure to take any steps, in any manner, to ensure compliance with *Brady*, the jury could find that individual prosecutors believed they could get away with violating *Brady*. Instituting training or other compliance mechanisms would have sent the opposite message and thus deterred violations.

In short, the jury was entitled to conclude that petitioners knew that prosecutors needed training to comply with *Brady*, that petitioners improperly failed to provide any type or degree of such training, and that that failure caused the *Brady* violation in Thompson's case. Section 1983 was designed to target that root *cause* of the constitutional deprivation to which Thompson was subjected. This case fits comfortably into the text of section 1983 and this Court's precedents.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HARRY F. CONNICK, District Attorney, et al.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

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INTEREST OF *AMICUS CURIAE*

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members[2] are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

Its affiliate, the Innocence Project, is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

[2] The member entities are listed in the appendix.

a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions not only destroy innocent lives but also allow the actual perpetrators to remain free, the Innocence Project's work both serves as an important check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories), are regularly consulted by officials at the federal, state and local levels.

In this case, the Innocence Network seeks to present its perspective on the issue presented in the hope that the risk of future wrongful convictions will be minimized and that the salutary incentives to the proper functioning of prosecutors' offices (as well as the compensatory function) of relief under *Monell v. City of New York Dep't of Soc. Services*, 436 U.S. 658 (1978), will be maintained. The organization works to ensure that innocent persons are not wrongfully convicted or incarcerated (or deprived of the *Monell*

remedy that this Court has recognized); and thus has an interest in proper training, monitoring, and supervision of prosecutors in district attorneys' offices, especially regarding issues relating to *Brady v. Maryland*, 373 U.S. 83 (1963).

The experience of the Innocence Network has demonstrated the unfortunate but substantial role that *Brady* violations repeatedly play in wrongful convictions. Indeed, Innocence Network research shows that a significant number of the thirty-six death penalty convictions obtained in the precise local jurisdiction here at issue—under Harry Connick's tenure as District Attorney in Orleans Parish—were later found to involve *Brady* violations; and in several instances, those defendants were exonerated or pardoned.[3] Such cases highlight the degree to which violations of *Brady* can undermine our system of justice, and the concomitant necessity of both enforcing defendants' rights to all evidence in the government's possession that is material and favorable to their defense and providing compensation where such a defendant can overcome the high hurdles to proving a §1983 case.

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[3] *State v. Bright*, 875 So. 2d 37 (La. 2004); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 4 Cir. 2002).

In *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988), no *Brady* violation was found but the prisoner's sentence was commuted to life in prison due to substantial doubts about his guilt. Two other prisoners had their convictions reversed on other grounds. *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29,1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La., May 28, 1993).

Placing too high a barrier on holding prosecutors' offices liable for *Brady* violations will remove a rarely implicated but nevertheless vital incentive for those offices to meet their *Brady* obligations and will only exacerbate the tragedy of wrongful convictions. Individual prosecutors are already immune from personal liability for such violations;[4] refusing to sustain a well-founded *Monell* claim against the prosecutors' office eliminates one of the few accountability incentives, and thus increases the likelihood that systemic problems, such as those that afflicted the Orleans Parish District Attorney's Office, will affect compliance with *Brady*.

STATEMENT OF THE CASE

We note, at the outset, that (i) the "question presented" in Petitioners' brief was not the one as to which certiorari was sought or granted; and (ii) the question on which Petitioners did seek and on which this Court did grant review (like Petitioners' reframed question) is, in reality, *not* presented by the facts of this case. Equally important, however, the jury's finding of liability under *Monell* for failure of the Orleans Parish District Attorney's Office to train, monitor and supervise *Brady* compliance is amply supported by the actual evidence, and cannot be reversed under this Court's precedents as to proper appellate review of jury verdicts.

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[4] *Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ___ (January 26, 2009).

Indeed, this is the archetypal situation for a jury to find *Monell* liability, especially because the jury here was specifically charged that it could not impose liability simply because the underlying conviction resulted from a single act of wrongdoing of a single prosecutor. First, at the time of Mr. Thompson's prosecutions, there was no effort by the Orleans Parish District Attorney's office directed at training or supervising assistant district attorneys as to their *Brady* obligations. And the jury had the opportunity to hear Connick himself in assessing his indifference in that regard. Moreover, four different prosecutors worked on Mr. Thompson's two separate trials for armed robbery and murder: yet each of those four prosecutors failed to reveal to Mr. Thompson's counsel multiple items of favorable evidence and witness-impeachment information proving that Mr. Thompson did not commit either crime. And none of them testified that they were deliberately violating *Brady*; to the contrary, the trial testimony of those prosecutors who took the stand established that they still just do not understand *Brady*. Because this *Brady* material was not turned over, Mr. Thompson was convicted first of armed robbery, then murder, and then sentenced to death.

The significance of the *Brady* violations is underscored by the dramatic fact that once the evidence that had been withheld was disclosed, Mr. Thompson (who fortuitously had not yet been executed) was fully exonerated of both the armed robbery and murder charges. Meanwhile, however,

Mr. Thompson had spent almost eighteen years on death row.

SUMMARY OF ARGUMENT

First, to the extent that this Court reaches the merits, the jury verdict in the District Court should be upheld in all respects. Both the jury instructions and the evidence were fully consistent with the standards this Court established for a finding of *Monell* liability in *Canton v. Harris*, 489 U.S. 378 (1989), and *Bryan County v. Brown*, 520 U.S. 397 (1997).

Juries are presumed to follow the court's instructions. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009). The jury here was specifically instructed that the failure of a single prosecutor to comply with *Brady* was *not* enough to find liability. Rather, liability could *not* be found unless the *office's* willful or deliberately indifferent failure to train, monitor, and supervise employees on their duties proximately and in fact caused the failure to produce the withheld *Brady* material. Additionally, the jury was instructed that "for a failure to train to be deliberately indifferent, there must be proof that the District Attorney knew that prosecutors would be confronted with difficult legal issues that had a substantial impact on Defendants' constitutional rights." *Thompson v. Connick*, 553 F.3d 836, 861 (5th Cir. 2008). The trial judge further clarified that deliberate indifference did not require a finding of intent, as this Court has observed in *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (fact-finder can infer deliberate indifference "from the fact that the risk of

harm is obvious"), and *Bryan County*, 520 U.S. at 419 ("Deliberate indifference is ... tantamount to intent."), but that it required "a showing of more than negligence or even gross negligence." (JA 828.)

Viewing the evidence in the light most favorable to the jury verdict, as federal appellate procedure requires, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996), it is clear that the evidence amply supported the findings specifically required by the jury instructions, that: (1) then-District-Attorney Connick's decision not to provide training and adequate guidance and supervision to the attorneys employed by the office with respect to their *Brady* obligations was an act of deliberate indifference to defendants' constitutional rights; (2) this failure was likely to lead to a denial of such rights; and (3) this indifference directly caused Mr. Thompson's wrongful convictions and eighteen-years' wrongful imprisonment.

Each of the four assistant district attorneys prosecuting Mr. Thompson's case failed at various points in time, and in *two* trials of this defendant, to meet their *Brady* obligations and failed to produce multiple material pieces of evidence favorable to the defense. The civil-case jury heard testimony from most of those very attorneys, as well as from other members of that prosecutors' office and their current and former supervisors, including testimony in which various attorneys from Connick's office disagreed (even now) about whether they would have been compelled to disclose the lab and police reports to Mr. Thompson's counsel. The jury also heard about the completely nonexistent training provided

with respect to prosecutors' *Brady* obligations. This indifference to a lack of training, combined with the policy of providing the minimum pre-trial discovery required by law, demonstrably posed grave risks to defendants' constitutional rights. Furthermore, the jury was certainly in the best position to assess the credibility and demeanor of the defense witnesses to determine whether Connick, as policymaker, had been deliberately indifferent to the need for training and supervision concerning *Brady* and criminal defendants' other constitutional rights.

There was plentiful evidence that Connick's failure to train and supervise his employees led directly to the constitutional violation that deprived Mr. Thompson of fair trials on both the armed robbery and murder charges, and placed this innocent man on death row for nearly eighteen years. The decision by a panel of the Fifth Circuit Court of Appeals, in affirming the District Court judgment, correctly respected the jury's fully supportable assessment of the evidence.

Second, if the Court were not to affirm, the writ of certiorari should be dismissed as improvidently granted because the question on which the Court granted certiorari is not presented by the record of this case. Petitioners' merits brief mischaracterizes both the facts of the case and the findings of the jury. But, more troublingly, in their merits brief, Petitioners re-frame the "question presented" in a way that not only differs substantially from that which was contained in their own petition for certiorari, but also presupposes a jury verdict that the district court's jury charge flatly

precluded. Specifically, Petitioners assert that the issue before this Court is "[w]hether failure-to-train liability may be imposed on a district attorney's office for *a prosecutor's deliberate violation* of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office." Pet. Br. at i (emphasis added). However, the jury found that fault lay "in the training program itself, not in a particular prosecutor." (JA 828.) Moreover, regardless of whether a single violation of *Brady* may justify liability under *Monell*, the facts of this case present no such issue. Rather, as the jury heard, multiple prosecutors, on more than one occasion, failed to produce a number of significant pieces of evidence from Mr. Thompson's counsel, at two separate trials. Inasmuch as neither the question on which this Court granted review, nor the question reframed by Petitioners, is fairly presented by the record, this case is an inappropriate vehicle for deciding it.

Third, any narrowing of *Monell* liability in the context of what the jury—after assessing Connick's own admissions and other prosecutors' in-court testimony and demeanor toward constitutional protections for criminal defendants—found to be the office's deliberate indifference to the need to train, monitor, and supervise its multiple prosecutors' compliance with *Brady*, would be deeply destructive of defendants' constitutional rights. The experience of the Innocence Project with the Orleans Parish District Attorney's office and other similar offices demonstrates the necessity of preserving *Monell*

liability as a deterrent.[5] This Court has provided individual prosecutors with a range of protections, including absolute immunity. *Monell*—however infrequently it is invoked, much less applied, against a prosecutors' office—is the sole remaining bulwark, other than reversals, against prosecutors' offices' indifference to training as to constitutional obligations, and it is often the sole method of compensation for wrongfully convicted defendants like Mr. Thompson. Simply trusting to the professionalism of each of the individual prosecuting attorneys has unfortunately proved—and continues to prove—insufficient to preserve defendants' constitutional rights. Incentives for prosecutors' offices to train and supervise, regrettably, are essential.

Preserving *Monell* incentives will not result in opening the floodgates to a sea of baseless *Monell* claims. The hurdles even for filing, much less prevailing in, a suit such as the instant case are many and high. Before a civil suit for damages based upon wrongful conviction or imprisonment may even be filed, a plaintiff must prove that his conviction or sentence has been reversed, expunged, declared invalid, or called into question by the issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). Indeed, in this case, Mr. Thompson had to go one substantial step further, by enduring a repeat of his murder trial, where he was, thankfully, promptly acquitted by the jury. Even then, a §1983 plaintiff like Mr.

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[5] *See supra* pp. 23-25.

Thompson must further surmount substantial hurdles to prove all of the elements of a constitutional violation as well as legal causation of injury. *See City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989).

Unless Petitioners believe that wrongful convictions like Mr. Thompson's occur commonly, the number of §1983 suits allowed to proceed will be small. Moreover, insurance is available to prosecutors' offices (indeed, in Louisiana, it is required by statute) such that the actual dollar impact on an office will frequently be limited to the deductibles.[6] But preserving the availability of *Monell* relief in proper cases would nevertheless provide an effective deterrent against deliberate indifference by a district attorneys' office to training and supervising prosecutors regarding their obligations concerning constitutional rights. In contrast, narrowing the scope of *Monell* liability to shield offices like Connick's puts the rights and liberty of any accused at risk.

Finally it must be emphasized that, given the demanding standards of culpability and causation,

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[6] *Brady* violations at trial, which are compounded by failures to disclose on appeal and during post-conviction proceedings, can trigger coverage for more than one policy period, which often involves more than one insurance company. Only a failure by the municipality to obtain any insurance creates a situation, such as this one, in which a relatively sizeable judgment will ultimately have to be paid by the government. We know of no instance where a municipality's financial stability has been in any way jeopardized because of a wrongful-conviction-based civil rights judgment.

and the many necessary preconditions for filing these suits, plaintiffs will prevail only under truly exceptional circumstances. But where such circumstances actually exist, recovery under *Monell* is not only appropriate but essential. After all, the award here can be no more than partial compensation for the grievous wrong inflicted upon Mr. Thompson, who spent eighteen years in prison with execution looming because of what a jury found to be the policymaker's deliberate indifference to the need to train, monitor, and supervise, and *not* because of an isolated act of wrongdoing of a single rogue prosecutor, as Petitioners misleadingly assert in their brief.

ARGUMENT

I. The Jury Verdict Below is Clearly Correct and Should Be Affirmed.

The jury's verdict finding liability under *Monell* should be upheld. It is axiomatic that a federal appellate court reviewing a jury verdict in a civil case must construe the record evidence in the light most favorable to the jury's verdict. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 432 (1996). Accordingly, such review requires deference to the jurors' superior position to assess the evidence, especially where, as here, the individuals accused of participating in, or responsibility for, the wrongdoing took the stand. The jury's verdict here must be affirmed unless no reasonable juror could have found that the withholding of numerous pieces of evidence from defense counsel by four different prosecutors, in Mr. Thompson's two trials, and the

consequent wrongful convictions, were caused by the deliberate indifference of the policymaker (whose demeanor they observed on the stand) to the need to provide adequate training, monitoring, and supervision with respect to the prosecutors' *Brady* obligations. Fed. R. Civ. P. 50(a)(1); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). Furthermore, juries are presumed to follow the Court's instructions. *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009). Here, the jury was correctly instructed (incidentally, without objection):

- That the issue to decide was "whether a policy, practice, or custom of the District Attorney's Office, or a deliberately indifferent failure to train the office's prosecutors proximately caused the non-production of the evidence." (JA 825.)

- That the policy, practice, or custom requirement could be met if an official policymaker failed to act when the need was obvious and the failure likely to result in a *Brady* violation such as to demonstrate deliberate indifference.

- That deliberate indifference could be shown where the District Attorney's office inadequately trained its prosecutors or failed to monitor them adequately in carrying out their duties, when that would obviously result in a constitutional violation, and that such indifference proximately caused the failure to disclose the *Brady* information.

- That, more specifically, if there was no official policy, practice, or custom that caused the non-production of *Brady* material, deliberate indifference could be found if "[t]he District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused, [t]he situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[, and that t]he wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights." (JA 820.)

- That it was more likely than not that "the *Brady* material would have been produced if the prosecutors involved in [Mr. Thompson's] cases had been properly trained, supervised, or monitored regarding the production of *Brady* evidence." (JA 829.)

- That to support liability, fault must lie "in the training program itself, *not in a particular prosecutor*." (JA 828 (emphasis added).)

Petitioners admit that the blood evidence was *Brady* material, and did not object to the judge's jury instruction to that effect at trial. The jury below found, consistent with these instructions, that the evidence presented on the record was more than ample to satisfy the requirements of the law as instructed. Accordingly, the jury concluded that the decision by Connick's office to provide *no* training as to prosecutors' *Brady* obligations caused Mr. Thompson to be wrongfully convicted of armed robbery and murder and to spend nearly two decades on death row. That verdict should be affirmed.

First, the jury's verdict was based on entirely appropriate instructions. Prior to deliberations, the jury was informed that a verdict for Mr. Thompson required finding that for a failure to train to be deliberately indifferent, there had to be proof that Connick knew that prosecutors would be confronted with difficult legal issues that would have a substantial impact on defendants' constitutional rights. (JA 828.)

The District Court also clearly distinguished between deliberate indifference and negligence, stating that deliberate indifference "requires more than negligence or even gross negligence," *id.*, but "does not necessarily mean intentional." (JA 832.) This is fully consistent with *Canton* and with *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), in which this Court held that a fact-finder may infer deliberate indifference "from the fact that the risk of harm is obvious." This Court has also noted that deliberate indifference involves "conscious disregard for the known and obvious consequences of [one's] actions,"

and again, may be inferred when the risk of harm is obvious. *Bryan County*, 520 U.S. at 413. At trial, Mr. Thompson's counsel did not argue that Connick's policies were established with the specific intention of depriving defendants of *Brady* material, but rather that they evidenced deliberate indifference to the risk of *Brady* violations, just as discussed in *Brown*.

The jury was also expressly required to find that the *office's* failure to train, monitor, and supervise its employees—*not* a single act by just one of them, as the Petitioners' brief erroneously reframes the question presented—was the cause of the failure to produce *Brady* material. In fact, the jury was charged that it was precluded from finding the prosecutors' office liable unless "[t]he fault [was] *in the training program itself, not* in a particular district attorney." (JA 828 (emphasis added).) The instructions provided to the jury are in accord with precedent and provide the framework for appellate review, particularly since they were not objected to by Petitioners at trial.[7]

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[7] Although Judge Clement argued in her separate opinion below that the jury instruction on deliberate indifference was plainly erroneous, a finding of "plain error" requires that a plain error in the district court proceeding affected substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. Here, the jury instructions were absolutely correct—which doubtless explains the lack of any objection from Petitioners. *A fortiori*, it is clear that the standard for showing plain error has not been met.

There was ample basis in the evidence (including the jury's ability to assess Connick's testimony and demeanor) for the jury to conclude that Connick's office was deliberately indifferent to *Brady* and that this failure to train caused Mr. Thompson to be wrongfully convicted in two separate trials, for two different crimes—because *Brady* violations by multiple prosecutors occurred in *both* of Mr. Thompson's trials.

Mr. Thompson was tried separately for the murder of Ray Liuzza and for an unrelated armed robbery that occurred three weeks later. The Orleans Parish District Attorney's office elected to prosecute Mr. Thompson for the latter crime first, however, so that the State could gain the tactical advantage of a prior armed robbery conviction in the murder trial. Four different prosecutors worked on Mr. Thompson's trials. Though obligated by *Brady* to do so, none of them disclosed to Mr. Thompson or his attorney: (1) the crime lab report that revealed the armed robber's blood type (which in fact was not Mr. Thompson's blood type and was thus directly exculpatory), or even the fact that they possessed a piece of clothing with the armed robber's blood; (2) a police report describing an eyewitness account of the murderer as six feet tall and with closely cropped hair (a description at odds with Mr. Thompson's short stature and full, bushy "Afro"); (3) a variety of additional witness statements including substantial impeachment material; and (4) evidence relating to a reward to one of the witnesses testifying against Mr. Thompson, the unfairness of which was heightened by the prosecutor's having *asserted the absence of*

any incentive to lie by the witness in his closing argument to the murder trial jury. The effect of withholding all this evidence was devastating, as the unfairly obtained armed robbery conviction effectively precluded Mr. Thompson from testifying in his own defense at his murder trial, leading to his death sentence and his eighteen years of wrongful incarceration.

The jury was nevertheless charged that it could only find for Mr. Thompson if, by indifferently failing to train or supervise its employees for *Brady* compliance, Connick's office created not a single bad-seed prosecutor, but a broader problem that inescapably led to *Brady* violations. The evidence at trial was more than sufficient to support the jury's finding, under the trial court's instructions, that these failures were indeed caused by the Orleans Parish District Attorney's office's deliberate indifference to the need for adequate training, monitoring, and supervision of the prosecutors' compliance with *Brady*. Prior to Mr. Thompson's 1985 trials, assistant district attorneys in Connick's office were provided literally no training on prosecutors' *Brady* obligations.[8] Moreover, despite ample opportunity for the various defense witnesses to explain what had happened, no prosecutor said that he deliberately violated *Brady*; and the record reveals that there was also no supervisory effort to

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[8] Although various informal training sessions were described at trial, there was little or no evidence that any of them pertained to *Brady*.

ensure or monitor against unwitting non-compliance with *Brady* obligations.[9]

Numerous witnesses testified as to the deliberate indifference of Connick's office to *Brady*'s mandate and the ignorance and confusion that ensued. The jury also heard testimony from Connick and other attorneys from his office, including some of those who had prosecuted Mr. Thompson. Each assessed whether various items of withheld evidence were *Brady* material that should have been turned over to defense counsel. Despite the internal procedures much-vaunted by Petitioners in their brief—which, incidentally, were *not* in place at the time of Mr. Thompson's convictions—even at trial, attorneys from Connick's office, including Connick himself, displayed completely flawed and inconsistent knowledge of what constitutes *Brady* material. (Tr. 172-74 (testimony of Eddie Jordan); 86-87, 381 (testimony of James Williams); 179-81 (testimony of Harry Connick).) Indeed, Connick's successor testified that Connick's office had a terrible record of *Brady* noncompliance. (Tr. 159-60.)

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[9] Although the jury was free to reject Petitioners' claims that there was any *Brady* guidance prior to 1985, even if the jury credited Petitioners' testimony, such guidance was incorrect and inaccurate, as reflected in an office manual issued in 1987, which summarized the *Brady* policies in effect in 1985. As explained in Respondent's Brief at 14-15, the manual clearly mis-described what *Brady* requires in multiple ways, such that an attorney following the policies described would have unknowingly withheld substantial amounts of *Brady* material from defendants.

Although Petitioners attempt to place sole blame for the nondisclosure of the lab report on the deceased Mr. Deegan, the evidence presented to the jury was clearly sufficient to support its finding that it was Connick's indifference to training and supervision regarding constitutional obligations, as opposed to a single rogue prosecutor, that was to blame. Mr. Thompson's other prosecutors were also aware of the blood evidence. (Tr. 505-509.) And Petitioners do not even purport to contend that it was Mr. Deegan who concealed police reports documenting witness descriptions of Liuzza's murderer inconsistent with Mr. Thompson's appearance, which likewise were not turned over to Mr. Thompson's counsel. (Tr. 607, 1079.) Nor do Petitioners argue that it was Mr. Deegan who concealed the fact that one of the witnesses who testified against Mr. Thompson received a reward for doing so, but which was also not disclosed by prosecutors. (JA 628, 737-43, 753-56.) All of this evidence constituted *Brady* material, and yet not one of the four assistant district attorneys prosecuting Mr. Thompson produced any of it, at either trial.

The jury was amply justified in concluding from all of the evidence, that this innocent man spent nearly two decades on death row as a direct result of the deliberate indifference to training, monitoring, and supervision of the Orleans Parish District Attorney's office. Petitioners' challenge thus cannot prevail because, construing the evidence in the light most favorable to the jury verdict, the jury's finding that the inadequate training and supervision of employees in the Orleans Parish District

Attorney's office caused the conviction of innocent persons, including Mr. Thompson, met *Monell*'s legal standard for liability. Accordingly, the verdict must be sustained on appeal.

II. The Writ Should Be Dismissed As Improvidently Granted Because the Question on Which This Court Granted Certiorari is Not Presented By the Facts of This Case.

Petitioners requested and were granted certiorari on the question whether "imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravenes the rigorous culpability and causation standards of *Canton* and *Bryan County*." The writ of certiorari should be dismissed as improvidently granted, as the question on which certiorari was granted is not presented in this case at all, [10] which may explain why Petitioners unilaterally chose to recast the question presented in their merits brief.

A. The Question On Which Certiorari Was Granted Is Not Presented By the Facts.

Although Petitioners attempt to portray this as a case in which Connick's purportedly well-

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[10] "After full argument and due consideration, [if it is] manifest that the course of litigation and the decisions of the [courts below] did not turn on the issue on the basis of which certiorari was granted," the writ should be dismissed as improvidently granted. Eugene Gressman, et al., SUP. CT. PRACTICE 361 (9th Ed. 2007) (citing *Smith v. Butler*, 366 U.S. 161 (1961); *Cichlos v. Indiana*, 385 U.S. 76 (1966)).

trained and well-supervised office was found liable under §1983 due to a single *Brady* violation by a lone rogue prosecutor, the facts of this case as contained in the evidence presented to the jury and described above present a very different picture: one in which Connick himself demonstrated deliberate indifference and four different untrained employees of the Orleans Parish District Attorney's office repeatedly and tragically violated *Brady* in numerous ways in the process of prosecuting Mr. Thompson in two different trials. This is stark evidence of the deliberate indifference to the need to monitor and supervise these prosecutors' *Brady* compliance and the consequences to defendants. Attorneys prosecuting Mr. Thompson were obligated under *Brady* to turn over not just the crime lab report indicating the blood type of the armed robber (which was not Mr. Thompson's blood type), but also the facts regarding the bloody clothing, the police report providing a description of the murderer that was wholly inconsistent with Mr. Thompson's appearance, the other witness statements with material favorable to the defense and impeachment material, and, not least, information relating to a reward to be received by one of the witnesses testifying against Mr. Thompson. Not one of the four prosecutors did so.

B. The Question Presented in Petitioners' Brief is Substantively Different From That On Which Certiorari was Granted.

Perhaps sensitive to the difficulty of squaring the evidence with the way in which the question presented was first framed, Petitioners shockingly

chose to frame the question presented in a quite different manner in their merits brief: "Whether failure-to-train liability may be imposed on a district attorney's office for *a* prosecutor's *deliberate* violation of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office." Petitioners' Brief at i (emphasis added). But this is even further removed from the record evidence, construed as it must be in the light most favorable to the jury's findings. Such a change is not permitted by Supreme Court Rule 24(1)(a), which provides that "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents."

A single *Brady* violation arising from a failure to train, monitor, and supervise (itself not the question presented by the record here), however, is substantively quite different from whether *Monell* liability may rest upon a deliberate flouting of the law by one individual employee in a single trial. And in this case, the jury was specifically precluded from finding in Mr. Thompson's favor if the facts were as Petitioners' new question presented assumes them to be. The jury was specifically charged that there could be no liability unless it found that Mr. Thompson's wrongful conviction was caused by "the training program itself, not ... a particular prosecutor." (JA 828.) Since this Court is obliged to construe the evidence in the light most favorable to the jury verdict, *Gasperini v. Ctr. for Humanities,*

Inc., 518 U.S. 415, 432 (1996), and the jury is presumed to follow the trial court's instructions, *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (2009), this Court must assume that the fault here did *not* lie in the deliberate act of a single prosecutor. Otherwise, it would be construing the evidence in a manner that is *contrary* to the verdict and assuming that the jury did *not* follow the instructions, as would be plainly improper under *Gasperini* and *CSX*. Clearly, neither version of the question as framed by Petitioners (whether in their petition or their brief) is presented in this case, which did not involve just one *Brady* violation (deliberate or not) by a lone individual at a single trial.

Nor does this case present a *Brady* violation by an office with "no history of similar violations." Petitioners' Brief at i. Petitioners made no such record and indeed, they could not have done so. Connick admitted on the stand that as of the date of his testimony, there were at least four published opinions reversing convictions secured during his tenure based on *Brady* violations and he recognized that judges' disagreements with his prosecutors' *Brady* violations are not limited to published opinions.[11] Moreover, just from reported decisions,

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[11] JA 452-55; *see also State v. Bright*, 875 So. 2d 37 (La. 2004); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 4 Cir. 2002).

In *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988), no *Brady* violation was found but the prisoner's sentence was commuted to life in prison due to substantial doubts about his guilt. Two other prisoners had their convictions reversed on other

during Connick's tenure as District Attorney, there were thirty-six capital convictions. Just over half of those convicted subsequently asserted that Connick's office withheld *Brady* material during their prosecutions.[12] Of the nineteen challenges, courts found that evidence had been improperly withheld in nine of the cases. *Id.* To date, five of the thirty-six people put on death row during Connick's tenure have been exonerated or pardoned.[13] This is hardly an insubstantial figure; rather, it is shockingly high.

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grounds. *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29,1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La., May 28, 1993). In addition, several death row inmates have filed *Brady* challenges that have not yet been finally adjudicated but that still could be found meritorious. Thus, there is as yet no final determination of the percentage of capital convictions by Connick's office involving *Brady* violations.

[12] *State v. Anthony*, 776 So. 2d 376 (La. 2000); *State v. Bright*, 875 So. 2d 37 (La. 2004); *Brown v. Cain*, 104 F.3d 744 (5th Cir. 1997); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Deboue v. Cain*, No. 01-464 (E.D. La. Apr. 21, 2005), *see also State v. Deboue*, 552 So. 2d 355 (La. 1989); *State v. Deruise*, 802 So. 2d 1224 (La. 2001); *State v. Frank*, 803 So. 2d 1 (La. 2001); *State v. Harris*, 892 So. 2d 1238 (La. 2005); *James v. Whitley*, 926 F.2d 1433 (5th Cir. 1991); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Lacaze*, 824 So. 2d 1063 (La. 2002); *State v. Mattheson*, 407 So. 2d 1150 (La. 1981); *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988); *State v. Smith*, 600 So. 2d 1319 (La. 1992), *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La., Jan. 29,1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D: La., May 28, 1993); *State v. Sullivan*, 596 So. 2d 177 (La. 1992); *State v. Thompson*, 825 So. 2d 552 (La. App. 4th Cir. 2002); *Ward v. Whitley*, 21 F.3d 1355 (5th Cir. 1994).

[13] *See n.13 supra.*

And this is just the tip of the iceberg.[14] Since the problem inherent in a *Brady* violation is concealment, many such violations, even in prosecutions for serious crimes, are never uncovered, much less become the subject of published court decisions. In Mr. Thompson's case, for example, the lab report withheld by prosecutors was not discovered until years after he was convicted, and even then only by chance. The true rate of *Brady* violations during Connick's tenure can never be known. But given what is known, Petitioners' assertion that this case involves a prosecutors' office with "no history" of *Brady* violations similar to those which led to Mr. Thompson's wrongful convictions is utterly without basis.

In sum, Petitioners mischaracterize the *Brady* violation record of the Orleans Parish District Attorney's office, Connick's own indifference to *Brady* and the need to train, the multifaceted misconduct of the four prosecutors in Mr.

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[14] For example, the Innocence Project, in the ordinary course of its work, came across a similar violation during the Connick administration. In the 1987 trial of Booker Diggins for rape and robbery, Connick's prosecutors did not reveal the existence of biological evidence left behind by the perpetrator and serological results identifying the perpetrator's blood type—just as occurred in Mr. Thompson's case. Equally revealing, the Diggins case, like Mr. Thompson's, was tried by multiple (three) prosecutors. Mr. Diggins spent the last twenty-two years in prison. A 2010 blood test excluded Mr. Diggins as the perpetrator His attorneys recently filed a *Brady* challenge. Application for Post-Conviction Relief (August 6, 2010) http://www.innocenceproject.org/docs/Booker_Diggins_Motion_to_Vacate_with_Exhibits.pdf.

Thompson's two separate criminal cases, and the question actually presented by the evidentiary record. Accordingly, the writ of certiorari should be dismissed as improvidently granted.

III. This Court Should Preserve the Role That *Monell* Liability Plays in Ensuring *Brady* Compliance and Preventing Wrongful Convictions.

This Court has consistently acknowledged that *Monell* liability is appropriate if "a plaintiff [can] show that the municipal action was taken with the requisite degree of culpability and [can] demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County,* 520 U.S. 397 (1997). Often, a deprivation of constitutional rights is a life-and-death situation, as it was for Mr. Thompson. Here, the municipal action was the decision not to train, monitor, or supervise assistant district attorneys in their *Brady* obligations; and the causal link was established between the many confused and incorrect judgment calls as to what constituted *Brady* material in 1985 (and through the present day) by attorneys employed by Connick's office and the constitutional deprivations that took eighteen years of Mr. Thompson's life, and came close to taking the rest. A reasonable jury could find, and did find—including after assessing Connick's and the other prosecutors' testimony and demeanor on the stand—that Connick's deliberate indifference to the need to train, monitor, and supervise had caused the violation of Mr. Thompson's constitutional rights. and thereby made the office subject to *Monell*

liability. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

In *Canton v. Harris*, 489 US 378, 390 (1989), this Court noted that when the need for training is "so obvious, and the [training] inadequacy so likely to result in the violation of constitutional rights," a municipality may be said to be deliberately indifferent and thus liable under *Monell*—precisely as the jury was charged (and found) here. The Court hypothesized that if a city issued firearms to police while requiring them to arrest fleeing felons, the need for training on the appropriate use of force was sufficiently obvious that *Monell* liability could lie if there were a failure to train.

To allow assistant district attorneys to prosecute capital cases without providing them any training regarding their constitutional obligations under *Brady* is no different. The threat to a capital defendant's life from the deprivation of constitutional rights is just as clear as in the case of the suspected felon fleeing from a police officer who has received no training in when and how to use a firearm in such situations. To shield the rare prosecutor's office that provides no *Brady* training to assistant district attorneys prosecuting capital cases from *Monell* liability would sanction a collective indifference to gross injustice. Because individual prosecutors and, now chief prosecutors, are protected from individual liability by absolute immunity,[15] the

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[15] *Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ___ (January 26, 2009).

only recourse the federal courts provide to wrongfully convicted individuals like Mr. Thompson is to meet the very heavy burden of *Monell* liability. And liability in such instances (should the jury find it) is deserved and its deterrent value important, since a prosecutors' office that is deliberately indifferent to its obligations under *Brady* in a capital case is no less dangerous than an untrained police officer who is given a gun and told to make arrests. In fact, Connick's admission regarding the reversal rate for his office's capital convictions on *Brady* grounds and the Innocence Network's research demonstrate that a substantial number of persons have been put in danger of death due to his deliberate indifference to *Brady*.

If *Monell* liability is curtailed, a significant incentive to comply with *Brady* would be eliminated. Discipline from the state bar is unlikely for chief prosecutors like Connick who are deliberately indifferent to constitutional rights.[16] Though most

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[16] Powerful proof that bar discipline is not an adequate or effective tool to deter prosecutors from engaging in misconduct, including the suppression of *Brady* material, comes from studies recently completed by the California Commission on the Fair Administration of Justice (C.C.F.A.J.).

Examining judicial decisions over the last ten years, the Commission's Prosecutorial Misconduct Report found that there had been 444 reported decisions where the courts themselves cited prosecutors for misconduct. In 54 of the cases, convictions were vacated; the remaining cases were generally affirmed, notwithstanding the prosecutorial misconduct, on the grounds of "harmless error." Moreover, a comparison of the misconduct in the harmless error cases and the reversal cases showed no significant difference in the nature or egregiousness

district attorneys' offices are run professionally and ethically, the Innocence Project would have far fewer cases if certain of these offices or certain of these prosecutors paid attention to this Court's decisions and their duties as members of the Bar in overzealous pursuit of convictions. What makes office-wide indifference to *Brady* violations particularly troubling is that, given the very nature

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of the prosecutors' behavior. Finally, a review of those cases in which the names of prosecutors were identified (347 of the 444 cases) showed that 30 of the prosecutors were found by courts to have repeated the same misconduct in at least one other case, without any bar disciplinary review being commenced.

In broader study covering the thirteen year period of 1997-2009, a commissioner who served on the California Commission on the Fair Administration of Justice, Professor Kathleen Ridolfi, who authored the C.C.F.A.J study on prosecutorial misconduct and Maurice Possley (Pulitzer-Prize-winning journalist and co-author of a 1999 Chicago Tribune study of prosecutorial misconduct nationally and in Illinois) uncovered nearly 700 cases, on average about one case a week – where courts found prosecutors committed misconduct. In 143 of the cases, the actions of prosecutors were so egregious that courts set aside convictions, declared mistrials, or barred evidence. In 548 additional cases, courts declared misconduct occurred, but declined to set aside the convictions because, despite the misconduct, courts found the defendant's trial was valid. Of 5,232 disciplinary actions published in the California State Bar Journal for that same 13-year period, only 5 prosecutors were disciplined for their misconduct arising in the handling of a criminal case, and all since 2005. Of the 566 cases in which prosecutors have been identified, 59 committed misconduct more than once and some as many as four times.

See Northern California Innocence Project, available at www.ncip.scu.edu (last visited Aug. 9, 2010).

of the violation, it is very difficult to discover the true extent to which *Brady* material is being hidden; and, unfortunately, individuals who violate *Brady* (not just young prosecutors who make errors) are rarely sanctioned by the Bar or the courts.

Fear of public censure will also fail to prevent such abuse. *Brady* violations are uncovered, if ever, only months or years after a defendant is convicted, and allegations and proof of *Brady* violations are unlikely to muster public interest after so much time has passed—much less trigger a wave of public sympathy for a prisoner convicted of a heinous capital crime. Most errors are not front-page news. Nor are most lawsuits. The weakness of public censure as a corrective lies not only with the mercurial nature of the press and what may, from day to day, interest its readers but the inability of factually innocent but wrongfully convicted parties to get the facts. Unanswerable to any suits at law, and shielded from discovery, an office may proclaim with impunity that it did nothing wrong. Prosecutors who are deliberately indifferent to this Court's mandates and the laws of the country that they are sworn to uphold will not even flinch at the prospect of a beat reporter showing up at their door. Shielding prosecutors' offices from liability will only make it less likely that the press will be able to uncover flawed policies that lead to the most egregious cases like the one at issue here.

Mr. Thompson's conviction arose from a widespread misconception caused by the indifference of the Orleans Parish District Attorney's office to both the constitutional obligation under *Brady* itself

and the need to train, monitor, and supervise prosecutors in fulfilling their *Brady* obligations. Proper training and guidance can mean not only the difference between liberty or incarceration, but as in Mr. Thompson's case (and those of at least three others convicted during Connick's tenure)[17], between life and death.

Like a police officer with a gun and no knowledge of when or how to use it properly, a prosecutor who does not understand the scope of his obligation to turn over *Brady* material jeopardizes the lives and wellbeing of citizens. In a case such as this, just one of the pieces of wrongfully withheld evidence, the results of a blood test, could have prevented the defendant from being convicted of one crime he did not commit and consequently being deprived of his right to testify in his own defense when accused of another. But the ability to withhold constitutionally required evidence with impunity does not endanger only the potential defendant; the public at large is endangered as well, when the innocent is wrongfully imprisoned or even executed while the true perpetrator walks free.

Eliminating *Monell* liability for prosecutors' offices also would remove a limited but necessary forum for public scrutiny of constitutional violations. The many preconditions to the filing of such suits already limit such claims to all but the most egregious violations. But where there are egregious violations, there *should* be liability, to provide both a

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[17] *See* n.12, *infra*.

measure of justice to the wrongfully convicted and a modicum of deterrence to the responsible municipal body. Even some prosecutors appear to think that *Monell* liability in these situations is a valuable tool. *See Van de Kamp v. Goldstein*, No. 07-854, 555 U.S. ___ (January 26, 2009), Amicus Curiae Brief of the States at 21. Protecting prosecutors' offices from potential *Monell* liability will only jeopardize the efficacy and credibility of the justice system and the wellbeing of innocent citizens unfairly caught within it.[18]

No floodgates would be opened by permitting these suits. Section 1983 claims founded upon wrongful conviction, or derivatives of such suits, may ordinarily be filed only after one establishes the invalidity of the underlying conviction. *Heck*, 512 U.S., at 487. In fact, Mr. Thompson's path in this litigation is quite unusual and not easily replicated. He was not only wrongly accused, but wrongly convicted. His appeals failed and he remained on death row for nearly eighteen years. He was eventually able to prove through extraordinary effort, and some good luck, that he was wrongly

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[18] Petitioners make much of the magnitude of the jury's damages award. But given the magnitude of the harm to Mr. Thompson, an innocent man, who spent eighteen years on death row, waiting to be executed, precisely because of Petitioners' disregard of his constitutional rights, the award is hardly disproportionate. And in any event, district attorneys' offices are generally not only able, but often required by law, as this one was, to purchase general liability insurance. *See, e.g.*, La. Stat. 42:1441.2(b). Accordingly, in most circumstances, the actual dollar impact on a prosecutors' office would be limited to the deductible.

convicted. But only after the ordeal of a second trial of the murder case, in which Mr. Thompson was quickly found not guilty by a jury, was he finally released from prison.

Yet even in this extraordinary case, only the most basic prerequisite for filing a claim had thereby been fulfilled. Vindication of trial-based rights through vacatur and dismissal of the original conviction is only the beginning of what must be satisfied in order to prevail. The mere assertion of a constitutional violation is not enough. A wrongfully convicted individual then must plead and ultimately prove the deliberate indifference to or intentional violations of established constitutional rights. And even that is not sufficient, because he must then prove that such intent or deliberate indifference came not from the line prosecutor who convicted him or even from an immediate supervisor with whom the line prosecutor consulted. Rather, as here, it must be related to an *administrative* decision that evinced deliberate indifference to—or intentionally attacked—a clearly established constitutional right, that *caused* a violation of that right. These many preconditions for a successful claim ensure that such suits would be uncommon unless the indifference of prosecutors' offices to their *Brady* obligations were even more common than it is.

The Innocence Project's experience highlights an additional obstacle as well: only a small fraction of cases can be researched to see whether a *Brady* violation occurred. For those who were convicted but nevertheless were factually innocent, attempting to prove that the *Brady* violation was material and

then obtaining vacatur and dismissal is incredibly difficult to achieve. Mr. Thompson's case provides an unusual example in which all of these requirements for suit are met. The link between his wrongful convictions and the prosecutors' office's deliberate indifference to training and supervising its employees as to their *Brady* obligations is rarely this clearly proven. By preserving *Monell*'s sanctions against such egregious and flagrant disregard of citizens' constitutional rights, this Court would reaffirm its confidence in the vast majority of prosecutors' offices and the importance of encouraging all such offices to respect its earlier decision in *Brady*.

This case is a perfect example of why *Monell* liability for *Brady* violations must be preserved. The Orleans Parish District Attorney's office was deliberately indifferent to *Brady* itself and to the need for *Brady* training and supervision. This indifference was likely to and did result in violations of the constitutional rights of the people it prosecuted, with potentially deadly results. It would have been straightforward to decide, as other offices have, to train assistant district attorneys on the weighty obligations they carried as prosecutors under *Brady*, especially in capital cases. What a jury that assessed Connick's trial testimony found to be his deliberate indifference to doing so brought John Thompson within a month of execution. Yet Connick and the individual prosecutors are immune from suit as individuals. Accordingly, as this Court recognized in *Monell*, it is only right and just that a person wronged in the way Mr. Thompson was

wronged be allowed compensation from the government institution that failed him so miserably, and that an office that turned its back on its constitutional obligations be held accountable for the damage that a jury found that it had caused.

CONCLUSION

For the foregoing reasons, and those presented by the Respondent, the District Court's judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence

Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.

AMICUS CURIAE BRIEF

No. 09-571

In The
Supreme Court of the United States

HARRY CONNICK, District Attorney, *et al.*

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of Respondent.[1]

INTEREST OF *AMICUS CURIAE*

The NACDL is a non-profit organization with a direct national membership of more than 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice.

The integrity of the truth-seeking function of the criminal trial requires that the prosecutor comply with his fundamental constitutional obligation to disclose evidence favorable to the defense under

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Prosecutors' lack of compliance inhibits our members' ability to provide meaningful representation to our clients and increases the likelihood that innocent men and women will be convicted, spend lifetimes in prison, or face the awful finality of the death penalty. NACDL is deeply concerned that the Petitioners' arguments in this case, if accepted by the Court, would remove important incentives for municipalities to ensure that prosecutors are properly trained and motivated to comply with their *Brady* disclosure obligations, and would deny civil redress for Respondent, who was so grievously damaged due to a District Attorney's shocking indifference to his training obligations.

We rely on the facts set forth in Respondent's Brief.

SUMMARY OF ARGUMENT

I. *Certiorari* was granted on the broad question of whether a municipality can ever be subject to failure-to-train liability for a prosecutor's single *Brady* violation, in the absence of prior violations providing notice of a need for such training. However, the facts are not as the Court assumed. There were numerous *Brady* violations committed by four prosecutors during two trials of Respondent John Thompson, and a history of *Brady*

violations by the Orleans Parish District Attorney's Office before that, which were known to the District Attorney, Harry Connick. Thus, *certiorari* was improvidently granted.

Complicating matters further is that Petitioners' Brief has now changed the question the Court agreed to consider. Petitioners still incorrectly assume this is a single violation case, but now ask the Court to decide the narrower question of whether a municipality can ever be held liable for a prosecutor's *deliberate* violation of a known *Brady* obligation. Since the jury could have reasonably inferred that the *multiple Brady* violations that caused Respondent's murder and robbery convictions were not all wilful, but resulted instead from the prosecutors' failure to recognize their *Brady* obligations due to inadequate training, Petitioners' newly-framed question is not fairly presented by the facts of this case. Rather than issue an advisory opinion on the question presented, the Court should dismiss the appeal.

II. Petitioners assume that "single violation" liability under *City of Canton v. Harris*, 489 U.S. 378 (1978), only extends to a municipality's failure to train *police* in the use of deadly physical force, or an equivalent situation, but the Court's decision was far broader. All nine Justices agreed that a municipality could be held liable, even in the absence of a history of similar violations, for a failure

to train "employees" or "personnel" where the need for training was apparent. *Id.* at 390 (White, J., for majority); *id.* at 396 (O'Connor, J., concurring). The Court wrote that the arming of police to employ deadly force without training was an "example" of when such liability might be imposed, not a "benchmark" as Petitioners contend, and did not imply that a "single violation" theory was limited to *police* misconduct. *Canton*'s "single violation" theory applies just as readily to a municipality's failure to train *prosecutors* in their complex *Brady* obligations.

III. Petitioners and their *amici* are incorrect that prosecutors' attendance at law school, their professional responsibility to know and follow the law, and their "fear" of discipline if they violate their disclosure obligations, somehow relieve a municipality from training prosecutors concerning their *Brady* obligations. A prosecutor's duty to disclose evidence favoring the defense under *Brady* is far more complex than Petitioners acknowledge. Neither the general education that law schools provide, nor the general obligation to produce "exculpatory" evidence that the disciplinary rules recognize, prepares prosecutors to decide the kinds of specific *Brady* issues that regularly arise in criminal cases and that were presented by this case. Meanwhile, it is incorrect that the "threat" of professional or employer discipline will suffice to ensure that prosecutors learn and abide by their

Brady obligations. The evidence overwhelmingly shows that such discipline almost never occurs.

The harm that a prosecutor's incorrect application of *Brady* may cause a criminal defendant – a lengthy prison term, life imprisonment, or even execution – is just as severe as the harm that a police officer's mistake may cause a criminal suspect. At the same time, *Brady* violations by prosecutors are even more insidious than misconduct by police because they are committed secretly and are almost never discovered by criminal defendants, who usually lack any access to counsel after losing their direct appeal. Even when a *pro se* defendant, against all odds, learns about a *Brady* violation, the likelihood that he will be able to prove his claim in court while effectively marshaling the evidence to prove materiality or prejudice, and also successfully overcome complex state and federal procedural prerequisites to relief, is remote.

IV. Petitioners and their *amici* seek *de facto* immunity for municipalities, notwithstanding the Court's contrary holding in *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Petitioners argue that a prosecutor's decision to withhold *Brady* material is always independent of his training, since it is dependent upon case-specific variables, such that lack of training can never be the proximate cause of a *Brady* violation. However, this ignores that there are principles of law under *Brady* in which line prosecutors must be trained so as to *constrain*

their exercise of judgment or discretion. A properly trained prosecutor's conclusion that potential impeachment evidence need not be disclosed because it is insufficiently material under the facts of the case, even if erroneous, would not subject a municipality to liability. However, the prosecutor's decision not to disclose the same evidence because he received no training, and therefore did not understand, that impeachment evidence falls under *Brady*, might. Consistent with the Court's analysis in *Owen*, the risk of failure-to-train liability for the municipality *should* be in the back of a policymaker's mind, especially since, under *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009), he need not have any fear of *personal* liability. This is consistent with the Court's teaching that prosecutors, when in doubt, should disclose. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995). If a culpable failure to train is the cause of a criminal defendant's grievous injuries, as in this case, the victim of the municipality's indifference should be able to obtain financial redress from the party that caused him the harm.

Even if a prosecutor deliberately withholds evidence he knows he must disclose under *Brady*, as Petitioners argue occurred in this case, such a decision still might reasonably be attributed by a jury to a culpable lack of training. Prosecutors face intense pressure to achieve convictions, especially in high-profile cases involving heinous crimes such as this one, and require instruction on how to resolve

conflicts between this pressure and their constitutional obligation to ensure that a defendant receives favorable evidence necessary for him to obtain a fair trial. Specifically, the policymaker must instruct his staff that, no matter what the pressure to convict, disclosing *Brady* material in order to ensure the defendant a fair trial represents a higher obligation. Rather than provide such instruction, Petitioner Connick merely informed his staff to disclose "exculpatory" evidence upon defense request and court order, and to be concerned, not with ensuring a fair trial, but with doing just enough to insulate the office against appellate reversal.

V. Finally, Petitioners' "floodgates" argument is completely overblown. The level of indifference to training and *Brady* compliance that District Attorney Connick exhibited in this case was surely rare in 1985, and would be rarer still today. Prosecutors need not fear civil liability for other types of trial-related misconduct, since most such misconduct occurs in open court and is subject to independent court rulings that likely would be considered a superseding cause of harm. This would be true even if, as in this case, the individual prosecutor's misconduct could also be successfully linked to a policymaker's utter indifference to an inherent need for training. Furthermore, *Heck v. Humphrey*, 512 U.S. 477 (1994), will block many potential lawsuits, as will the need to plead sufficient

facts to survive a motion to dismiss under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

ARGUMENT

I. *CERTIORARI* WAS IMPROVIDENTLY GRANTED

Petitioners obtained *certiorari* by representing that this case involved a "single *Brady* violation." But, as Respondent contended, this is not a "single violation" case. Respondent's Brief in Opposition to *Certiorari* at 12, 18-20. There were an appalling *series* of *Brady* violations, during two separate but coordinated criminal prosecutions designed to result in the imposition of the *death penalty*. Not one, but *four* prosecutors withheld potentially exonerating blood evidence, withheld prior inconsistent statements by key witnesses, including an inconsistent physical description of the perpetrator, and withheld evidence of another key witness's motive to lie (the existence of a monetary reward offer, which the prosecutor's summation falsely denied). *See* Respondent's Br. at 18-20. Meanwhile, Connick's testimony acknowledged that he elected not to require any *Brady* training of his staff despite four prior appellate reversals on *Brady* grounds and additional, unspecified *Brady* rulings against his Office. JA452-55. The trial court permitted the jury to consider all of the *Brady* violations in this and in

the prior cases as evidence of lack of training, causation, or notice. JA826.

Having obtained *certiorari* on the incorrect premise that this is a "single violation" case, Petitioners now purport to re-frame the question presented, while relying on an additional, inaccurate factual assumption. Petitioners' Brief now asks the Court to decide whether "failure-to-train liability may be imposed on a district attorney's office for a prosecutor's *deliberate* violation of *Brady v. Maryland*, despite no history of similar violations in the office." Petitioners' Brief at i (emphasis added). But Respondent's principal theory of recovery was not that the violations in Respondent's case were "deliberate," but that they likely resulted from the prosecutors' failures to *recognize* their *Brady* obligations due to deficient training.

In contending that no amount of training could have prevented a "deliberate" violation of *Brady*, Petitioners and their *amici* make the remarkable assumption that the four experienced prosecutors who handled this case, including the third-ranking prosecutor in Connick's office, engaged in what they characterize as a *criminal* cover-up of potentially exonerating scientific evidence in a death penalty case – essentially, a conspiracy to cause the state-sanctioned "murder" of a potentially innocent man. *See* Petitioners' Br. at 20-21; *Amici Curiae* National Association of Cities, *et al.* Brief at 2-3; *Amicus*

Curiae Orleans Parish Assistant District Attorneys Brief at 3, 8-12. But the jury was not required to reach such a shocking conclusion. Rather, it could have inferred that the failure to disclose the blood evidence at Respondent's robbery trial resulted from Connick's inexcusable failure to train his staff concerning, and their consequent failure to understand, the requirement that they (a) disclose *potentially* exonerating evidence where its ultimate significance depended upon other evidence that the prosecutor did not then have, (b) follow up rather than consciously avoid obvious leads to exonerating evidence, and (c) turn over favorable evidence regardless of whether the defense had specifically requested such disclosure. Similarly, the jury could have inferred that lack of training, not deliberate misconduct, caused the prosecutors to withhold various items of impeachment evidence at Respondent's murder trial.

In sum, it appears that *certiorari* was improvidently granted based upon two false factual premises: that Respondent's injuries were caused by a "single violation" and that no prior violations put the District Attorney on notice of a need for training. Further, because Petitioners now ask the Court to decide a different, narrower issue that is not fairly based on the facts of the case, the Court's decision would be an advisory one. Therefore, the appeal should be dismissed.

II. THE COURT SHOULD NOT FORECLOSE 'SINGLE VIOLATION' *CANTON* LIABILITY FOR A MUNICIPALITY'S FAILURE TO PROVIDE ANY TRAINING TO PROSECUTORS CONCERNING THEIR *BRADY* DISCLOSURE OBLIGATIONS

A. Municipal Liability For *Brady* Violations Under A Failure-To-Train Theory, In The Absence Of Prior Similar Violations, Fits Comfortably Within This Court's Precedents

The question as to which the Court thought it was granting *certiorari* is whether failure-to-train liability under 42 U.S.C. § 1983 for a *Brady* violation may ever be imposed on a municipality where the line prosecutor's violation of the plaintiff's rights was not preceded by prior violations that provided the municipality with notice that its training program was deficient. We believe that, under *City of Canton v. Harris*, 489 U.S. 378 (1978), the answer is yes. There is nothing about the prosecutorial function that should immunize a municipality for a constitutional violation under *Brady* that was the highly predictable consequence of an obviously deficient training program.

That a municipality may be held liable for inadequate training under § 1983 absent a prior

pattern of similar violations, and that such a theory of liability is not limited to police misconduct cases, was *unanimously* established by the Court in *Canton*. Both Justice White's majority opinion for six members of the Court, and Justice O'Connor's concurrence, which was joined by Justices Scalia and Kennedy, made clear that municipal liability could be based upon a policymaker's deliberate indifference to an obvious need for training. As Justice White explained in Part III of his opinion, which the entire Court joined, "it may happen that in light of the duties assigned to specific *officers or employees* the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390 (emphasis added). Agreeing, Justice O'Connor separately wrote that liability may attach where there is "a clear constitutional duty implicated in recurrent situations that a particular *employee* is certain to face . . . [and where] the failure to inform *city personnel* of that duty will create an extremely high risk that constitutional violations will ensue." *Id.* at 396 (emphasis added). Each opinion then added, as a *second* method for showing notice of a need for better training, that a plaintiff could prove a history of similar violations. *See id.* at 389-90 n.10 (majority opinion); *id.* at 396-97 (concurring opinion). In sum, the Court established the principles (a) that *Monell* liability may be imposed for lack of training even

where there was no history of similar constitutional violations, and (b) that such a theory was applicable not just to police but generally to municipal "officers or employees" or "personnel".

The Court's only other decision discussing "single-incident" liability is *Bd. of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997). There, the plaintiff sought to hold a municipality liable for the single decision to hire a deputy sheriff who later assaulted him. The Court, this time with Justice O'Connor writing for the majority, rejected any analogy "between failure-to-train cases and inadequate screening cases." *Id.* at 398. "Unlike the risk for a particular glaring omission in a training regimen," Justice O'Connor reasoned, "the risk from a single instance of inadequate screening of an applicant's background is not 'obvious' in the abstract." *Id.* at 410. The Court *reiterated* its discussion in *Canton* "leaving open . . . the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations." *Id.* at 409. Subsequently, the plaintiff succeeded in showing that the Bryan County Sheriff's inadequate *training* program had resulted in an employee's violation of plaintiff's right to be free of excessive force, and the Fifth Circuit upheld the judgment under *Canton*'s "single violation" theory. *Brown v. Bryan County, Okl.*, 219 F.3d 450, 465 (5th Cir. 2000).

Nothing in *Canton* suggests that "single violation" liability would be inappropriate for a municipality's complete failure to train prosecutors in their *Brady* obligations. Contrary to Petitioners' contention, Br. at 32, the Court did not use the need to train police officers in the use of deadly force to apprehend fleeing felons as a "benchmark" of when training might be constitutionally required; it *wrote* that it was using it as an "example." *See Canton*, 489 U.S. at 390 n. 10; id. at 396 (O'Connor, J., concurring). Indeed, in *Canton* itself, by remanding the case for a new trial, the Court left open the possibility of "single incident" liability for a municipality's failure to train police concerning when to summon medical care for an injured detainee.[2] But even assuming *Canton* set a benchmark, the complexity and difficulty in applying *Brady* principles, the certainty that such situations will arise and that, without training, wrong decisions will be made, and the extreme harm that such wrong decisions will cause, makes it incumbent on

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[2]Petitioners assert that the "lower courts' chief mistake was to divorce *Canton*'s hypothetical from its facts. . . . *Canton*'s untrained officers were essentially asked to intuit deadly force standards." Petitioners' Br. at 35. But in their myopic focus on *Canton*'s hypothetical, Petitioners lose sight of the fact that *Canton* was not a deadly force case – it involved whether officers received insufficient training in providing emergency medical care to detainees – and the Court remanded the case for a new trial on that issue.

municipalities to train prosecutors to recognize and to fulfill their *Brady* obligations.

B. The Need To Train Prosecutors In Their *Brady* Obligations Exceeds, Or Is At Least Equal To, The Need To Train Police Officers Concerning The Constitutional Constraints On Their Discretion

Petitioners and their *amici* contend that municipal policymakers are entitled to assume, in the absence of a history of violations, that prosecutors, in contrast to police, need no training under *Brady* because they attend law school and are professionals with an obligation to know and to follow constitutional and ethical rules of behavior. *See* Petitioners' Br. at 28-31. For the following reasons, we disagree.

1. Prosecutors Are Specialists Who Require Particularized Training In Their Constitutionally-Required Functions, Including *Brady*

Petitioners and their *amici* contend that lawyers, unlike police, are professionals, like doctors, and that therefore a municipality need no more train a lawyer concerning *Brady* than a doctor in "diagnostic nuances." Petitioners' Br. at 30 (quoting

Judge Clement's dissent, Pet. App. 29a); *Amicus* National Ass'n of Cities, *et al.* Brief at 3. They presume that lawyers are adequately educated about *Brady* in law school just as doctors are adequately educated about medicine in medical school. This reasoning makes no sense.

A criminal prosecutor is a specialist in a discrete area of law, just as a surgeon, an anesthesiologist, an oncologist, or a psychiatrist is a specialist in his or her area of medical specialization. A municipality cannot take a general medical practitioner, provide him no training in surgery, charge him with performing operations at a city-run clinic, and then escape liability when he kills or maims a patient. The doctor's attendance at medical school, "on-the-job" training, and professional responsibility to provide competent care are obviously inadequate preparation for carrying out such a specialized function on behalf of his municipal employer. Similarly, criminal prosecutors have specific responsibilities, and must make a myriad of judgments, based upon a range of knowledge that they do not obtain at law school, such as the specific principles that govern disclosure under *Brady*. There is nothing in the trial record in this case establishing that Connick had any reason to believe that law school alone prepared his prosecutors for such duties.

That criminal prosecutors must receive specific training to be qualified to handle criminal

prosecutions in accordance with their constitutional, statutory, and ethical responsibilities was recognized by the American Bar Association at the time of Thompson's trial. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function Standards, § 3-2.6 & Commentary (3d ed. 1993) ("Training Programs").[3] In recommending that prosecutors' offices establish "training programs . . . for new personnel and for continuing education of the staff," the ABA commented that "[e]ven lawyers with extensive experience in the trial of civil cases must undergo new training . . . before they can function effectively in the trial of a criminal case." *Id.* The ABA also advised that "it is critical, furthermore, that training within the prosecutor's office emphasize professional responsibility." *Id.* Although Connick, in his trial testimony, tried to pander to the jury by dismissing the ABA as some "liberal" group, JA443, this Court has cited the ABA's standards as a significant source for determining the minimum requirements of the profession, *see, e.g., Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010) (ABA standards are "guides to determining what is reasonable") (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). *Amicus* National District Attorneys Association ("NDAA") similarly has recognized that "legal positions" in prosecutors' offices "require . . . specialized expertise." NDAA,

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[3]This standard is "unchanged," *id.*, from the prior edition, which was published in 1980.

National Prosecution Standards, Commentary to § 9.1, *et seq.* Ironically, the NDAA, in its *amicus* brief here, ignores its own standards.

Despite his dismissal of such standards in his trial testimony, Connick plainly recognized, while he was D.A., that law school graduates had to be trained in numerous areas of responsibility before they would be qualified to handle significant criminal cases. Indeed, Connick, in his brief, congratulates himself on the extensive training and supervision his new prosecutors received in virtually every type of function. Petitioners' Br. at 5-6. There was just one area missing: *Brady*. That Connick would recognize the need to instruct prosecutors in virtually every facet of prosecution, but provide no training about compliance with *Brady*, was a powerful piece of evidence before the jury proving his deliberate indifference to whether such compliance actually occurred. Obtaining *convictions* obviously mattered far more.

Certainly by 1985 it should have been obvious to any District Attorney in this country that the *Brady* requirement was far more complex, and required far more subtle decision-making, than simply disclosing "exculpatory" evidence that had been specifically requested by the defense and ordered by the court, which was all that Connick's policy suggested was necessary, JA703-05. The Supreme Court had advised in *Giglio v. United*

States that prosecutors' offices "establish" "procedures and regulations" to ensure that *Brady* information is disclosed to defendants. 405 U.S. 150, 154 (1972). Court decisions in Louisiana involving Connick's own office,[4] as well as decisions elsewhere,[5]

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[4] *Hudson v. Blackburn*, 601 F.2d 785, 709 (5th Cir. 1979) (prosecutor erroneously failed to disclose discrepancy in lineup identification, but error was insufficiently material to require reversal); *Davis v. Heyd*, 479 F.2d 446, 453 (5th Cir. 1973) (prosecution required to disclose prior inconsistent statement of its witness despite absence of specific defense request; conviction vacated), abrogated on other grounds, *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976); *State v. Perkins*, 423 So.2d 1103, 1107-08 (La. 1982) (conviction reversed due to D.A.'s refusal to produce potentially exculpatory statement of uncalled witness); *State v. Curtis*, 384 So.2d 396, 398 (La. 1980) (conviction reversed due to D.A.'s failure to reveal eyewitness's initial inability to identify defendant during a photo array); *State v. Falkins*, 356 So.2d 415, 417 (La. 1978) (court reversed conviction after prosecutor erroneously testified that she was not required to disclose that prosecution eyewitnesses initially identified someone other than the defendant); *State v. Carney*, 334 So.2d 415, 418-19 (La. 1976) (conviction reversed due to D.A.'s failure to disclose witness's non-prosecution agreement); *State v. Hammler*, 312 So.2d 306, 309-10 (La. 1975) (conviction reversed after prosecutor violated *Brady* by telling potentially exculpatory witness not to talk with the defense).

[5] *United States v. Agurs*, 427 U.S. 97, 106-07 (1976) (prosecutor must turn over material favorable evidence even without specific request, and is responsible for discovering and disclosing such information in the government's files regardless of individual good or bad faith); *Giglio v. United*

already had reflected the wide array of issues that could arise under *Brady* (including the very issues that would arise in this case), and the difficulties prosecutors had in fulfilling their responsibilities properly. Connick should have been aware of these decisions in determining whether to train his staff –

States, 405 U.S. 150, 154-55 (1972) (government required to disclose impeachment evidence involving understanding or agreement with witness); *Walker v. Lockhart*, 763 F.2d 942, 955 (8th Cir. 1985) (*Brady* obligation continues post-conviction); *Chaney v. Brown*, 730 F.2d 1334, 1353 (10th Cir. 1984) (FBI report containing witness statements that tended to exculpate defendant); *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983) (impeachment evidence showing witnesses' financial interest in testifying for government), *rev'd, United States v. Bagley*, 473 U.S. 667 (1985) (reversing on "materiality" grounds); *United States v. Herberman*, 583 F.2d 222, 229-30 (5th Cir. 1978) (prosecutor has duty when in doubt to allow court to examine potential *Brady* material); *United States v. Butler*, 567 F.2d 885, 888-89 (9th Cir. 1978) (government must disclose its knowledge of witness's expectation of leniency when it conflicts with his testimony denying same); *Boone v. Paderick*, 541 F.2d 447, 451-52 (4th Cir. 1976) (promise of favorable treatment must be disclosed whether made by prosecutor or police); *United States v. McCrane*, 547 F.2d 204, 206 (3d Cir. 1976) (preferential treatment of government witnesses); *Grant v. Allredge*, 498 F.2d 376, 377-78 (2d Cir. 1974) (leads to possible exculpatory evidence); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1967) (physical examination contradicting rape victim's story); *Barbee v. Warden*, 331 F.2d 842, 847 (4th Cir. 1964) (ballistics and fingerprint reports casting doubt on defendant's criminal involvement).

although, in fact, his testimony revealed that he lacked any interest in *Brady* and had acquired only inaccurate "knowledge" of it. *See* Respondent's Br. at 8-11. If Connick had used his own ignorance of *Brady* as a guide, he would have realized the need to provide at least some training to his employees in *Brady's* specific requirements.

2. The Principles That Determine Whether Information Must Be Disclosed Under *Brady* Are Far More Complex Than The Rules Governing The Use By Police Of Deadly Physical Force

The rules governing *Brady* compliance are more complex than the rules governing police use of deadly physical force, and *Brady's* complexity should have been apparent to Connick. As demonstrated in the prior section, *see* pp. 19-20, nn. 4-5, prior to 1985 (and even more so today), there were numerous court decisions applying *Brady* where the outcome was not obvious under the *Brady* decision itself. *Brady*, which referred to evidence material to "guilt or innocence" or punishment, 373 U.S. at 89, did not discuss what evidence fell under these two broad categories. Would evidence that was not "exculpatory," such as impeachment evidence, have to be disclosed, and if so, what types of impeachment? Would evidence that was exculpatory on its face, such as a recantation, or that was otherwise inconsistent

with the prosecutor's theory, have to be disclosed even though the prosecutor either believed that it lacked reliability or that it could be reconciled with his other evidence? What about evidence that, while not exculpatory by itself, might exonerate the defendant if combined with other information known by the defense or ascertainable by the prosecution? What would be the prosecutor's obligation, if any, to obtain and disclose *Brady* material in the possession of an outside police agency? When must *Brady* material be disclosed? Would a defense request for the evidence affect the obligation to disclose? How would materiality be measured? Would materiality be judged cumulatively or based on each individual piece of evidence?

Given the extraordinary range of questions that the *Brady* decision itself left unanswered, but that subsequent court decisions addressed, it was absolutely *certain*, in the absence of any training by Connick, that his line prosecutors would make erroneous decisions affecting the liberty, or even the very life, of criminal defendants. On the other hand, training about the specific principles governing application of *Brady* would have made the violations that occurred in this case much less likely. The prosecutors would have understood, contrary to Connick's own erroneous belief and to the limited disclosures required by his vague, general "policy," that blood evidence had to be turned over because of the significant possibility that, in combination with

other evidence (the defendant's blood type), it would prove exculpatory; that such evidence had to be disclosed even in the absence of a specific defense request and a court order; and that an eyewitness's inconsistent description of the perpetrator, as well as a witness's hope for a monetary reward, had to be disclosed for the purpose of impeachment.

3. In Many Instances, *Brady* Violations May Be More Harmful To The Victims Than Unlawful Conduct By Police

If police trying to apprehend fleeing suspects misuse deadly physical force, death or serious bodily injury may result. This, of course, is the most extreme example of injuries to civilians that may be caused by police. But police engage in all sorts of other functions that may violate the constitutional rights of individuals short of killing or maiming them, where training nevertheless may be constitutionally required. It is not, for example, intuitively obvious when police, consistent with the Constitution, may enter a home to make an arrest, conduct searches incident to arrest, inventory searches, body cavity searches, or "searches" of a computer, give *Miranda* warnings and cease (or resume) questioning, or make arrests for loitering or obscenity. It is hard to imagine that there would be no municipal liability if, in these recurrent areas of police responsibility, officers were not trained at the

Police Academy or otherwise in the applicable constitutional rules.

Prosecutors who violate their constitutional obligations under *Brady* are highly likely to inflict injuries at least as serious as the harm that police may cause. In this case itself, Thompson was imprisoned for 18 years, and was just a few weeks away from *execution*, before the evidence that the prosecutors had withheld was fortuitously discovered. Had he been executed, he would have been no less dead than the victim in *Tennessee v. Garner*, 471 U.S. 1 (1985). Even in a non-capital case, a prosecutor who withholds *Brady* material may cause an innocent man to spend the rest, or a significant portion, of his life in prison.

Connick acknowledged in his testimony that *Brady* decisions must be made in many cases, and that errors in judgment may have terrible consequences for the defendant, JA451. But there is one further consideration that makes *Brady* violations even more insidious: the inherent secrecy with which they are committed.

4. *Brady* Violations Are Especially Harmful Because They Are Committed In Secret And Almost Never Discovered

Unlike police errors in the course of investigating crime, which usually are the subject of defense motions before and during criminal trials, *Brady* violations almost always occur in secret, and will almost never be discovered by the defense. Whether the prosecutor's error is deliberate or inadvertent, the defense will generally never know that any violation has occurred. *Brady* establishes an honor system; no one independent of the prosecutor searches his files. And once the trial is over, there is no further discovery. The defendant may appeal his conviction, but he is limited to the appellate record. After his appeal is denied, he no longer even has access to counsel to investigate or advocate for him.

The lack of access to counsel after direct appeal makes it virtually impossible for criminal defendants to uncover *Brady* violations, let alone obtain any remedy for them. Neither states nor the federal government have any obligation to supply counsel for an indigent defendant once he has lost his direct appeal, except in death penalty cases. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1990); *McFarland v. Scott*, 512 U.S 849, 853-54 (1994). Thus, the vast majority of defendants – poor and

uneducated in the law – are on their own. While some jurisdictions permit limited access to police or prosecutorial records pursuant to Freedom of Information Act requests, the officials who field such requests are often the same officials who have withheld the evidence in the first place. *See, e.g.*, New York Public Officer's Law § 87(1)(b) (McKinney's 2009) (requiring public agencies to establish their own rules for disclosure of records to the public). And *pro se* inmates lack the legal expertise to enforce such requests.

The rare uncovering of a prosecutor's withholding of *Brady* material almost always is a result of an inmate's extraordinary perseverance or pure luck. In this case, Thompson was represented for many years by tenacious and talented *pro bono* death penalty counsel who, *14 years* after Thompson's conviction, miraculously found the exculpatory blood-analysis evidence in the microfiche records of the police. Had Thompson received life in prison without parole instead of a death sentence, he would have had no counsel at all and the violation would never have been discovered. In *People v. Ramos*, 614 N.Y.S.2d 977 (N.Y. App. Div. 1st Dept. 1994), the *Brady* evidence that ultimately freed a young teacher, after he spent seven years in prison for a child rape that almost certainly never occurred, surfaced only because the child's mother brought a civil suit, insurance attorneys disclosed the exculpatory evidence to the defendant, and he had a

mother who worked day and night to save funds with which to retain counsel to collaterally attack his conviction. *See* Stephen Gillers, *In the Pink Room,* in Legal Ethics: Law Stories, at 1 (David Luban & Deborah L. Rhode eds., 2006).

In the rare case that an unrepresented inmate somehow learns of *Brady* material, insuperable obstacles will almost always block his road to release. Unassisted by counsel, he will have to complete his investigation of the violation and its circumstances and, from prison, obtain the evidentiary material with which to prove it in court. He will then have to prepare a written motion to vacate his conviction demonstrating, through a comprehensive analysis of the trial record, that the violation was "material." If his motion is denied, he will then have to pursue an appeal while taking care to exhaust his federal claims. And finally, if he has been able to figure out how to properly exhaust his remedies in state court, he will have to perfect his federal habeas corpus petition within the strict one-year statute of limitations while meeting all the other complex procedural requirements of the federal habeas statute, including overcoming the difficult burden of showing why AEDPA deference need not be accorded to any state court decision. *See* 28 U.S.C. § 2254(d)(1) (1996).

In sum, training (and the potential for municipal liability) is all the more essential in the

prosecutorial, as opposed to the police, context, to ensure that secret, extraordinarily harmful, and almost always irremediable *Brady* violations do not occur.

5. The Pressure On Prosecutors To Obtain Convictions Requires Training Concerning The Competing Value Of Fairness To The Accused

Petitioners argue that the *Brady* violation they concede occurred in this case – the withholding of the blood analysis evidence – resulted from wilful misconduct that training about substantive disclosure obligations would not have averted. Even if they are correct that the withholding was wilful, reasonable training likely would have averted it. Just as police are under pressure to solve a heinous crime, prosecutors are expected to get a conviction. They need to be *trained* to understand and accept that, when a conflict inevitably arises between their obligation to fight for a conviction and their obligation to ensure a fair trial for the accused, the latter obligation must take precedence. In a recent article discussing the importance of "prosecutorial regulation" and "accountability," one expert recommended that prosecutors' offices conduct "training exercises" to "reinforce" the message that prosecutors should refrain from an unchecked "notches-on-the-belt conviction mentality."

Stephanos Bibas, *Prosecutorial Regulation, Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 1009 (2008-09). Indeed, this Court has taught that, when in doubt, prosecutors should disclose possible *Brady* material. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence" and that "is how it should be"); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure").

Rather than provide such instruction, Petitioners' explicit *policy* – to withhold all documents not explicitly required by state law to be disclosed while revealing *Brady* material necessary to avoid an appellate reversal or successful collateral attack – encouraged gamesmanship. It implied that *Brady* material should be disclosed for strategic reasons to benefit the prosecution, rather than to ensure a fair trial for the accused, even at the risk of an acquittal.

6. Prosecutors Are Rarely Disciplined For Violating *Brady* And The Rules Of Professional Responsibility Alone Do Not Provide Sufficient Guidance

Petitioners and *amicus* NDAA argue that in-office training is not necessary because published

ethical rules suffice and because prosecutors have strong incentive to learn and to follow the rules or else face professional sanction. Petitioners' Br. at 13, 28; NDAA Br. at 10-11. However, these propositions are incorrect. As the NACDL's *amicus* brief submitted in *Pottawattamie County, Iowa v. McGhee*,547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S.Ct. 2002 (2009), *appeal dismissed*, 130 S.Ct. 1047 (2010), at 19-40, conclusively shows, prosecutors are far less likely to be sanctioned than police officers who engage in misconduct and are subject to investigation and discipline by civilian review boards and internal affairs units.

First, most states' rules of professional conduct contain broad pronouncements that prosecutors have special obligations, including to disclose *Brady* material, but lack guidance any more specific than Petitioners' vague written policy of how to perform this obligation. *Compare* Model Rules of Professional Conduct, § 3.8(d) (1983) ("Model Rule § 3.8) ("The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"), *with* JA704 (Orleans Parish's "*Brady* Material" policy

containing similarly limited language, discussed in Respondent's Br. at 9-11). As Fred C. Zacharias pointed out before Thompson's criminal trials, the Model Rule's "special prosecutorial duty is worded so vaguely that it obviously requires further explanation . . . In effect, code drafters have *delegated to prosecutors* the task of resolving the special ethical issues prosecutors face at every stage of trial." Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 46 (1991) (emphasis added).

Second, "most commentators agree that professional discipline of prosecutors is extremely rare." Bennett T. Gershman, *Reflections on Brady v. Maryland*, 47 S. Texas L. Rev. 685, 722 (2006). *See, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275, 296 (2007) (terming the discipline that occurred in the notorious "Duke lacrosse" case the "Mike Nifong exception" because "the case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished"); Shelby A.D. Moore, *Who is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. Tex. L. Rev. 801, 807 (2006) ("prosecutors are rarely, if ever, punished" by professional disciplinary bodies, even when engaged in "egregious misconduct"); Fred C. Zacharias, *The*

Professional Discipline of Prosecutors, 79 N.C. L. Rev. 721, 755 (2001) ("discipline rarely occurs").

Recently, task forces convened in New York and California to examine the causes of wrongful convictions came to the same troubling conclusion: prosecutorial misconduct is a substantial cause of wrongful convictions, errant prosecutors are virtually never disciplined, and the widespread lack of discipline causes such misconduct to occur. *See* Final Report of the New York State Bar Association's Task Force on Wrongful Convictions 7, 19, 29-31 (2009) ("Task Force Report"), *available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf; Final Report, California Commission on the Fair Administration of Justice 70-73 (Gerald Uelmen ed., 2008)("Justice Commission Report"), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

Petitioners emphasize that one Orleans Parish assistant district attorney was disciplined for failing to disclose his knowledge of the withholding of blood evidence during Thompson's prosecution while Thompson was facing execution. Petitioners' Br. at 13, 28; *see In Re Riehlmann*, 891 So.2d 1239, 1248-49 (La. 2005). But this was a rare exception to the norm of no discipline. Indeed, none of the three surviving prosecutors who actually *committed* the numerous *Brady* violations during the course of Thompson's

case has ever been disciplined, either by the Orleans Parish District Attorney's Office or the bar. Testimony at the trial revealed that Connick himself called off the grand jury's investigation of those prosecutors. JA18, 539.

C. The Withholding of *Brady* Material By A Prosecutor Is Not An Inherently 'Independent' Act For Which A Municipality Is Essentially Immune

Petitioners and their *amici* contend that, because a prosecutor is a professional who has to exercise reasonable judgment and discretion in relation to the unique facts presented by each case, a municipality is essentially immune for the prosecutor's unlawful decision to withhold *Brady* material because it is inherently independent of his defective training. Petitioners' Br. at 37-39, D.A.'s Ass'n of State of New York *Amicus* Br. at 12-15; D.A.s' Ass'n of New York *Amicus* Br. at 7 (inviting Court to extend prosecutorial immunity to municipalities). Indeed, *amicus* D.A.'s Ass'n. of New York sees each *Brady* decision as so independent of training and supervisory policy that each Assistant D.A. is a "final policymaker" for the individual case. Br. at 10. Petitioners and *amici* essentially are making an end-run around *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980), which rejected absolute immunity for *municipalities* for the constitutional violations of their individual

prosecutor-employees, while also disregarding that the Court declined to grant *certiorari* on this very question. Petitioners' position is plainly incorrect.

Petitioners do not dispute that Connick was the final policymaker with respect to *Brady* compliance by members of the office. If, as can be inferred from the evidence, he abdicated his training responsibility by leaving it to individual prosecutors to make their own *Brady* "policy" on a case by case basis, then the correctness of the jury's verdict is beyond doubt. "[A] city's lawful policymakers [may not] insulate the government from liability simply by delegating their policymaking authority to others . . . ." *City of St. Louis v. Paprotnik*, 485 U.S. 112, 126 (1988). It is such policymakers who are responsible for reasonably constraining their subordinates' exercise of discretion. Just as it would be an abdication of policymaking responsibility for a police commissioner to "train" his officers that they may use force to apprehend a fleeing felon without providing more specific training to guide such behavior, it is an abdication of policymaking responsibility for a District Attorney to tell line prosecutors nothing more than to comply with their unspecified obligations under *Brady*.

The responsibility of a prosecutor to apply *Brady* principles to a set of facts presented by an individual criminal prosecution is no different than the responsibility of any other municipal employee to

exercise discretionary authority on behalf of his employer. In each instance, the factual context to which the rules of behavior must be applied may be complex, so that there is room for the reasonable exercise of individual discretion, or the obligation may be unambiguous, in which case the employee may not have any discretion. If the employee has been reasonably trained, then the municipality cannot fairly be blamed if he errs in exercising his discretion, or if he deliberately ignores his training. But if the employee has not been trained at all in the constraints governing his decision, then his discretion will be unguided and subject to his individual whim. Where such an unguided and unconstrained exercise of discretion leads to harm, the evidence may permit the jury to infer causation arising from culpable lack of training.

The Petitioners' argument that causation for *Brady* misconduct can never be shown because prosecutors exercise "independent" or discretionary judgment would create *de facto* absolute immunity for municipalities, contrary to *Owen* and *Monell*. In *Owen*, the Court squarely rejected any municipal immunity for discretionary governmental functions under § 1983. 445 U.S. at 648-49. "Elemental notions of fairness," the Court reasoned, "dictate that one who causes the loss should bear the loss." *Id.* at 654. The Court found no history of municipal immunity at the time Congress enacted § 1983 and, absent such a history, recognized that the Court was

not free to adopt such a rule for "policy" reasons. *Id.* at 635; *see also Monell v. Department of Social Services*, 436 U.S. 658, 659 (1978). Moreover, policymakers, who are protected by immunity principles from personal responsibility, *see, e.g., Van de Kamp*, 129 S.Ct. at 858-59, should be forced to weigh the risk of inaction to the *municipality*'s coffers, *see Owen*, 445 U.S. at 656.

Although Chief Justice Rehnquist worried in his dissenting opinion in *Owen* that policymakers would be overly inhibited by "strict liability for their [municipality's] torts," *id.* at 665, the Court's subsequent adoption of a deliberate indifference standard has alleviated that concern, *see Bryan County*, 520 U.S. at 419. The Court should not accept *amici*'s invitation to use causation as an indirect means for "overruling" *Owen* by extending *de facto Goldstein* immunity to municipalities. A properly instructed jury should be permitted to consider whether a prosecutor's commission of a constitutional violation directly resulted from a policymaker's culpable decision not to train him – as in any other *Monell* case.

Finally, Petitioners and their *amici* argue that Orleans Parish cannot be held liable for the *Brady* violations that occurred in this matter because they were deliberately made in *defiance* of Connick's *Brady* policy, not because of any deficiency in training. However, a reasonable jury could have

found that the violations were not intentional, but resulted from a lack of awareness, due to deficient training, that the material was subject to disclosure under *Brady*. *See supra*, pp. 8-9. Regrettably, nothing in Connick's *Brady* policy required prosecutors to disclose the information that was erroneously withheld in this case. Moreover, even if the erroneous withholding was wilful, a reasonable jury could have found that it resulted nevertheless from insufficient *Brady* training in how to resolve the conflict between the obligation of a prosecutor as an advocate to obtain a conviction and his higher obligation to ensure the defendant a fair trial. *See supra*, pp. 9-10.

D. Allowing *Canton* Liability In The Rare Prosecutorial Case That Satisfies Its Exacting Prerequisites Will Not Open Any 'Floodgate' To Such Lawsuits Or Threaten Municipal Budgets

Permitting so-called "single violation" liability for prosecutorial *Brady* violations caused by the deliberate indifference of policymakers to the obvious need for training will open no "floodgate" to lawsuits for *Brady* violations or any other kind of prosecutorial trial error, contrary to Petitioners' warning. Petitioners' Br. at 41. There has been no "flood" of "single violation" cases since *Canton* involving any arena of government, let alone involving District

Attorneys who have failed to train their staff concerning *Brady*. For numerous reasons, the likelihood of future such "single violation" cases is remote.

First, whatever the practice was in 1985 when Thompson's trials were conducted, it is clear that today virtually all District Attorneys' offices train their staff concerning *Brady*.

Second, as we have noted, *Brady* violations are almost impossible to discover, and the procedural obstacles a prisoner faces in obtaining relief from his conviction, a prerequisite to any civil suit, *see Heck v. Humphrey*, 512 U.S. 477 (1994), are daunting.

Third, many criminal defendants who successfully raise a *Brady* claim will plead guilty to obtain their release from custody or avoid a re-trial, and will not be in a realistic position to press a damages lawsuit.

Fourth, *Monell/Canton* lawsuits are extraordinarily complex, time-consuming, and difficult. Considering the uncertainty of a favorable outcome and therefore of compensation, attorneys will be loathe to undertake them except when they appear clearly meritorious.

Fifth, permitting "single violation" *Brady* lawsuits will not open the door to *Monell* lawsuits for

other prosecutorial trial violations, making "liability into the norm," with "ruinous implications for prosecutorial offices." Petitioners' Br. at 35-36. Other constitutional violations by prosecutors – the use of illegally-obtained evidence, reliance on hearsay, or summation misconduct – occur openly and can be litigated on the spot. In such instances, the court's ruling almost always will be viewed as an independent or supervening cause of harm that would protect the municipality from liability. Moreover, prosecutors certainly *are* trained regarding such issues. Tellingly, in the Second Circuit, in the nearly 20 years since the court decided *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), there have been no successful lawsuits for non-*Brady* constitutional violations committed by prosecutors at trial (and no reported "single violation" *Brady* case).[6]

Sixth, many lawsuits will be stopped in their tracks under *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Few plaintiffs will be in a position to show a

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[6]The only reported case involving non-*Brady Monell* liability for a prosecutorial policy is *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998). There, the Second Circuit upheld a judgment against a municipality based upon an Equal Protection claim of an explicit, unlawful policy of the District Attorney, on behalf of the county, to always favor an initial complainant over a cross-complainant. That was not a "deliberate indifference" training case.

reasonable possibility of success on a "single violation" training claim at the pleading stage.

Petitioners and *amici* NDAA worry that the judgment in this case will be ruinous to Orleans Parish, but the municipality, through Petitioner Connick, is responsible for allowing its insurance policy to lapse, Respondent's Br. at 64 n.7, a singularly reckless or inept act that should neither inure to the municipality's *benefit* nor serve as a basis to foreclose this or any other meritorious lawsuit. In general, a lawsuit against a municipality for *Brady* violations at trial, under which a plaintiff may recover only for post-conviction damage, will involve a smaller recovery than a malicious prosecution lawsuit against a police detective under which pre-conviction damages may be assessed as well. Indeed, lawsuits for police misconduct, slips and falls, injuries to firefighters, and other acts by municipalities or their employees are far more costly than extraordinarily rare § 1983 lawsuits for *Brady* violations by prosecutors. Petitioners and *amici* present no evidence that "single violation" municipal liability under *Brady* will have any significant financial impact on municipalities or their taxpayers.

CONCLUSION

Brady disclosure by properly trained prosecutors is essential to the truth-seeking function of a criminal trial and to fulfill our commitment as a

civilized society to avoid convicting and punishing the innocent. Relying on evidence that a deplorable pattern of *Brady* violations by four separate prosecutors resulted from the District Attorney's utter indifference to his obligation to train his staff members in their *Brady* obligations, a jury properly awarded substantial damages to the victim of this pervasive misconduct. This was a just result that was faithful to the principles of municipal liability laid down in *Canton*, and it should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

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Petitioners,

v.

JOHN THOMPSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICI CURIAE BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The National District Attorneys Association (NDAA) was formed in 1950 and is the oldest and largest professional organization in the world representing criminal prosecutors. The NDAA's members are responsible for prosecuting criminal violations in every state and territory of the United States, and they are found in the offices of district attorneys, state's attorneys, attorneys general and county and city prosecutors.

The NDAA was formed to provide a national perspective for issues arising in local prosecutors' offices and to advocate at a national level for prosecutors on those issues. The association also seeks to foster and maintain the honor and integrity of the prosecuting attorneys of the United States, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. The parties were notified at least ten days prior to the filing of this brief.

The interests of the NDAA and its members are directly implicated by this case because it involves a $15 million judgment against a local district attorney's office for alleged violations committed by prosecutors found to have been inadequately trained in their obligations to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That judgment threatens to cripple the local district attorney's office and hamper the performance of its essential functions. The judgment will also constrain the office's future efforts to prevent violations, of whatever type, by diverting valuable funds and resources. And the alarming prospect for similar judgments in other offices across the country based on similar claims implicates the NDAA's national mission even more directly. As a national organization, the NDAA has a significant interest in the adoption of a uniform approach to single-incident municipal-liability claims that affirms and retains heightened standards for imposing liability against municipal entities like district attorney's offices.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as amicus curiae in appellate cases when it

concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

SUMMARY OF THE ARGUMENT

The Court has consistently recognized that plaintiffs must satisfy stringent culpability and causation requirements in order to hold municipal entities liable for single-incident claims based on a failure to adequately train employees. To relax these standards would allow vicarious liability for employees' torts under de facto *respondeat superior* liability, which would be constitutionally suspect, incompatible with the text of 28 U.S.C. §1983, and inconsistent with the Court's decisions.

The petitioners' brief persuasively explains how the decision below improperly erodes the heightened culpability and causation standards that properly limit municipal liability, contravening the Court's clear precedent and the constitutional and doctrinal principles that underpin it. The NDAA submits this brief to augment those arguments by explaining how the relaxed approach would have serious detrimental consequences for the administration of justice across the Nation, by straining prosecutorial budgets and resources, improperly interjecting the federal courts into the retroactive micromanagement of prosecutors' offices, and impeding the ability of district attorneys to focus on their primary mission of enforcing the law. By punishing district attorneys' offices for the offenses of their outlying bad actors, the relaxed rule

will not only hamper good prosecutors' efforts to punish actual criminals, it will also, ironically, by overtaxing resources, produce more of the same sort of violations it is intended to prevent. The decision below, which affirmed a $15 million judgment that is roughly equal to the annual budget of the Orleans Parish District Attorney's Office, is an excellent example of how allowing liability in similar situations will harm rather than promote the swift and fair prosecution of crimes by district attorneys.

ARGUMENT

I. REDUCING THE BURDEN FOR LIABILITY FOR SINGLE-INCIDENT FAILURE-TO-TRAIN CLAIMS IS CONTRARY TO THE COURT'S CASES.

The Court has consistently reaffirmed that §1983 municipal liability must rest on heightened requirements of culpability and causation. See, *e.g.*, *Monell* v. *N.Y. City Dept. of Social Servs.*, 436 U.S. 658 (1978); *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986); *Canton* v. *Harris*, 489 U.S. 378 (1989). These heightened requirements are necessary in order to prevent holding a municipality liable on a theory of *respondeat superior*, which would contravene both the text of §1983 and Congressional intent. See *Monell*, 436 U.S., at 668-669, 673-675, 691-692; *Pembaur*, 475 U.S., at 481; *Canton*, 489 U.S., at 392; *Board of Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 404 (1997). Specifically, a plaintiff must show deliberate indifference on the part of the municipality and direct

causation of the plaintiff's alleged harm by the alleged failure to train. *Canton*, 489 U.S., at 389.

The decision in this case, however, effectively rejects these restrictions by allowing liability based on a single-incident *Brady* violation where there was no evidence of a causal connection between the claimed failure to train and the harm that was done to the respondent when prosecutors wrongfully withheld evidence that led to his being convicted. Br. 45-53. The petitioner's brief explains the Court's doctrine in this area and convincingly demonstrates how the ruling below fails to impose the necessary strictures on culpability and causation required to limit municipal failure-to-train liability to its proper scope. Br. 36-41. It also articulates why the dangers of allowing a less strict standard are particularly severe when the claim is based on a single incident allegedly caused by a failure to train, and especially when the alleged failure to train relates to lawyer's duties—like the *Brady* duty at issue here—that prosecutors have an independent professional obligation to learn and perform. Br. 25-31.

In short, a prosecutor who deliberately withholds evidence he knows he should divulge in order to wrongly convict an innocent man is not the same as a police officer given a gun and put on the street with no training on how to use it—the paradigmatic example of single-incident failure-to-train liability hypothesized by the Court in *Canton*. *Canton*, 489 U.S., at 390, n.10. By upholding liability on a record that reflects, at most, diffuse disagreement in the

district attorney's office about what *Brady* required and, in fact, is far more consistent with an intentional violation of known ethical and legal obligations, see Br. 54-60, the decision below incorrectly approved municipal liability for a classic employee intentional tort that no amount of training could have prevented.

II. A Relaxed Liability Rule Will Have Wide-Ranging Harmful Consequences for the Efficient and Fair Administration of Justice by District Attorneys.

Relaxing the culpability and causation standards for single-incident failure-to-train liability is not only inconsistent with the Court's teachings, it will also cause serious, wide-ranging practical harms. Specifically, the relaxed liability rule applied by the decision below will impair both the budgets and the discretion of district attorneys' offices, impeding the swift, effective, and fair administration of justice in localities across the country.

A. The Relaxed Rule Threatens to Impose Wide-Ranging Liability.

The decision below opens up a wide scope of liability for district attorney's offices. As the Court has recognized, "adopt[ing] lesser standards of fault and causation would open municipalities to unprecedented liability," as essentially it will embrace "*de facto respondeat superior* liability." *Canton*, 489 U.S., at 391-392. Given that a single incident can support liability even when not shown to have a clear causal connection to the constitutional violation,

every incident of prosecutorial error or malfeasance will become a potential subject for a failure-to-train suit in which plaintiffs can argue that more (or more formal) training would have prevented the violation. A potentially successful lawsuit thus would arise after every case reversed due to prosecutorial mistakes or misconduct—even when the prosecutor's office had no prior indication that the mistake or misconduct was likely to occur or might have been prevented.

Moreover, the field for such suits will not be limited to *Brady* errors. Instead, failure-to-train suits will bloom in all sorts of circumstances. Relaxed culpability and causation would permit liability "against any prosecutor's office for nearly any error that leads to a reversal of a conviction," including errors relating to failure to disclose impeachment material,[2] "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." *Thompson* v. *Connick*, 578 F.3d 293, 304 (CA5 2009) (en banc) (Clement, J., urging reversal). This will include second-guessing the conduct of the trial itself since, as the Court has noted, "better training or supervision might prevent most, if not all, prosecutorial errors at trial." *Van de Kamp* v. *Goldstein*, 129 S.Ct. 855, 863 (2009).

Further, the strict rules conferring prosecutorial immunity, see *Imbler* v. *Pachtman*, 424 U.S. 409, 428

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[2] See *Giglio* v. *United States*, 405 U.S. 150 (1972).

(1976), will mean there is a natural pressure to impose liability on the office as an alternative to the (immune) prosecutor. The relaxation of liability standards endorsed by the decision below will make such pressure harder to resist, and inevitably lead to more large money judgments against district attorney's offices. See *Canton*, 489 U.S., at 391-392 (noting that in "virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident"). Prosecutor's offices will increasingly be hit with large money judgments based on the deliberate wrongful acts of individual prosecutors.

B. The Relaxed Standard Will Strain Prosecutorial Budgets at a Particularly Bad Time.

The increase in large money judgments that would follow from the relaxed rule applied by the decision below will strain prosecutorial budgets at a particularly inauspicious time. These are difficult economic times for the Nation, and in particular for state and local governments. Budget shortfalls are predicted to afflict 48 states in fiscal years 2010 and 2011. *E.g.*, McNichol & Johnson, Recession Continues to Batter State Budgets; State Responses Could Slow Recovery, Ctr. on Budget & Policy Priorities, http://www.cbpp.org/cms/?fa=view&id=711 (last visited Dec. 1, 2009). Similar shortfalls are predicted for 2012. *Ibid.*

Prosecutors' offices are no exception, also facing dire budgetary conditions for the foreseeable future. See, *e.g.*, Nevada County District Attorney Raises Budget Concerns, May 13, 2010, http://yubanet.com/regional/Nevada-County-District-Attorney-Raises-Budget-Concerns.php. (noting that, due to budget constraints, "[s]tarting July 1, 2010, this office will no longer be able to file and prosecute many 'quality of life' type crimes such as drunk in public, fighting, battery, trespass, vehicle code infractions or City ordinance violations."); More Cuts at the San Joaquin DA's Office, Jan. 12, 2010, http://www.jdjournal.com/2010/01/12/more-cuts-at-the-san-joaquin-das-office/; Alameda County, California to Cut 29 Attorneys, June 12, 2009, http://www.jdjournal.com/2009/06/12/alameda-county-california-to-cut-14-attorneys/; Haley, District Attorney: Budget Crisis Means Justice Won't be Served, Sacramento Press, May 13, 2009, http://www.sacramentopress.com/headline/7590/District_Attorney_budget_crisis_means_justice_wont_be_served (noting that budget shortfalls would require office to cut entirely "major narcotics, community prosecution, special investigation, statutory rape, elder abuse and child abduction," and reduce in size "homicides, gangs, domestic violence, adult sexual assault, victim witness advocates, juvenile hall, and special assault and child abuse.").

In this climate, large money judgments for long-past isolated acts of prosecutorial misconduct will blow great holes in already swamped budgets

and gravely impair the administration of justice. With more of their resources going to pay for liability judgments, prosecutors will be constrained in performing their essential public justice functions, and also in taking prophylactic steps to avoid future violations. As Justice O'Connor noted over 20 years ago, the "grave step" of prompting a shift in the allocation of scarce resources means that some "services will necessarily suffer, including those with far more direct implications for the protection of constitutional rights." *Canton*, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part).

Further, even for unsuccessful suits, defense costs may be substantial. Just as with suits against prosecutors in their individual capacities, suits against prosecutors' offices, like this one, will be brought years after the fact and place "unique and intolerable burdens" on offices "responsible annually for [thousands] of indictments and trials." See *Imbler*, 424 U.S., at 425-426. Cities will be forced to defend against cases with stale evidence and, as in this case, without key witnesses. Defending against these suits will further strain the limited resources of the prosecutor's office, which will be required to defend the suits vigorously since, as in this case, their entire yearly budget may be on the line.

"[T]he resources of local government are not inexhaustible." *Canton*, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). At present, the resources of many localities, and their

prosecutors' offices are nearly exhausted. To add to that challenge the burden of defending against, and paying large judgments in, collateral suits arising out of long-distant past convictions will unnecessarily and undesirably increase the budget strains under which district attorneys' offices must perform their essential public justice functions.

C. A Relaxed Liability Standard Will Impede District Attorneys' Executive Ability to Manage and Innovate.

The relaxed rule applied in the decision below will harm the administration of justice not only by sapping offices' scarce resources, but also by constraining the discretion of district attorneys' to manage those scarce resources as they see best. District attorneys know how to run their offices better than federal judges or juries, and they are the ones who have been elected by the people or appointed to do so. This includes the discretion to decide whether a formal training program is the most effective way to prevent violations of defendants' constitutional rights. That is why failure-to-train liability should be imposed only when it is clear that a district attorney failed to adopt a training program out of deliberate indifference to the possibility of constitutional violations and that lack of training clearly caused the constitutional violation at issue.

The decision below, which imposes liability based on murky causation and no showing of deliberate indifference, will inevitably hamstring district

attorneys' discretion to manage their offices. Once a jury imposes a massive verdict for failure to establish a formal training program about some type of error, a formal training program will need be instituted, regardless of whether the district attorney thinks it is the best way to prevent that type of violation.

Further, prospectively, district attorneys will have to think defensively about how to set up programs that will best allow them (and their successors) to defend against future lawsuits based on the inevitable (though regrettable) bad acts of rogue prosecutors. Indeed, if an individual prosecutor's unilateral decision to withhold *Brady* materials can spawn municipal liability for failure to train, then a risk adverse prosecutor's office will take measures to train for nearly any potential constitutional violation.[3] Cf. *Thompson*, 578 F.3d, at 295 (Jones, C.J., dissenting). This will necessarily impair the effectiveness of district attorneys' in organizing and managing their offices to prosecute crimes in the most effective way. Cf. *Imbler*, 424 U.S., at 425 ("[I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his

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[3] Under the minimal burden required by the courts below, almost any constitutional violation would satisfy *Canton*'s standard of imposing liability only when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S., at 390.

energy and attention would be diverted from the pressing duty of enforcing the criminal law.").

At the same time district attorneys are being constricted in performing the executive function they are uniquely suited (and elected) to perform, federal courts will be thrust into the inapt role of second guessing district attorneys' management of their offices. As the Court warned, under the relaxed standard applied in this case, federal courts will have to engage "in an endless exercise of second-guessing municipal employee-training programs . . . an exercise . . . the federal courts are ill suited to undertake" and one that implicates "serious questions of federalism." *Canton*, 489 U.S., at 391-392. The Court should keep federal courts out of that unsuitable business and preserve district attorneys' discretion to manage their offices by reaffirming its jurisprudence requiring high standards of culpability and causation.

III. The Effects of this Particular Judgment on the Orleans Parish District Attorney's Office Illustrate the Practical Ills of the Relaxed Rule.

The potential effects of this particular judgment on the Orleans Parish District Attorney's office provide a specific, compelling example of the practical harms that would follow from approving the relaxed rule applied by the decision below.

First, the judgment below will devastate the budget of the Orleans Parish District Attorney's

office. The Orleans Parish District Attorney's office has an annual operating budget roughly on par with the amount of the judgment, leaving it scant room for anything other than satisfying the judgment. See Bohrer, Court Upholds $14 Million Judgment Against Orleans DA's Office, Assoc. Press, Aug. 11, 2009. Indeed, the office has been forced to consider bankruptcy to prevent the asset seizure that may result from enforcement of the judgment. See Financial Woes Could Halt Justice System, WDSU.com, Jan. 7, 2009, http://www.wdsu.com/money/18426227/detail.html.

That financial imposition is being visited, moreover, on an office whose resources are already stretched to the breaking point. It was in New Orleans that the phrase "misdemeanor murder" was coined in the aftermath of Hurricane Katrina and the overwhelming strains that disaster placed upon the city. Newspapers reported that suspected murderers were being released after 60 days because the district attorney's office lacked the resources to investigate and indict within the statutorily required 60-day period. See La. Code Crim. Proc. art. 701 (2006).[4] Thousands of felony suspects were released due to failure to prosecute—in 2006, nearly 3,000 of these 60-day releases occurred in hard hit Orleans Parish. See Anderson Cooper 360 Degrees, Murder City USA:

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[4] That 60-day requirement was subsequently amended to 120 days.

24 Hours in New Orleans, CNN Transcript Aired Feb. 8, 2007, http://transcripts.cnn.com/TRANSCRIPTS/0702/08/acd.02.html; see also Brown, New Orleans Murder Rate for Year Will Set Record, Guardian News and Media, Ltd., Nov. 6, 2007, http://www.guardian.co.uk/world/2007/nov/06/usa.

While not all of those were murders, media sources reported that there are a number of examples of murder suspects who were released based on failures to indict after only 60-days in jail—which is the same amount of time a misdemeanor offender could spend in prison. See, *e.g.*, Filosa, Crime Thrives Under 60-Day Rule, The Times Picayune, Feb. 12, 2007, http://www.nola.com/news/t-p/frontpage/index.ssf?/base/news-7/117126311331140.xml&coll=1.

The New Orleans District Attorney's office is already financially in extremis, much like many other offices around the country. See Anderson Cooper 360 Degrees, Murder City USA: 24 Hours in New Orleans, CNN Transcript Aired Feb. 8, 2007, http://transcripts.cnn.com/TRANSCRIPTS/0702/08/acd.02.html ("A New Orleans judge . . . predicts 7,000 will walk [in 2007] because the justice system is still so overwhelmed."). Saddling that office with liability for the bad acts of a rogue prosecutor (or two) conducted decades ago, without requiring a stringent showing that those acts were *caused* by a failure to train, will go a long way towards destroying its ability to do justice in a swift, effective, and fair manner.

Second, the judgment will second-guess, and retrospectively condemn, the management decisions of a district attorney who greatly innovated and improved the office. As the petitioner's brief explains, the tenure of District Attorney Connick was notable for his innovative and effective approach to updating and improving prosecutor training and office procedures. Br. 3-6. Yet the judgment below will punish the New Orleans District Attorney's office for not having a formal *Brady* training program, superseding District Attorney Connick's experienced judgment about the most effective way to administer the office to make use of its very scarce resources and ensure that prosecutors are monitored and guided to prevent constitutional violations.

District Attorney Connick's management will be second-guessed, moreover, without strong evidence that the harm done to Thompson was caused by the lack of formal training, or that the lack of such training was due to Connick's deliberate indifference to *Brady* violations, as opposed to a calculated, executive decision that there were better, more efficient, and more effective ways to educate prosecutors on their duties. Br. 42-45. Misconduct that was most likely intentional prosecutorial wrongdoing will become the basis to punish and reduce the discretion of the District Attorney to manage the office in a way best designed to promote the effective, efficient, and fair administration of justice. Prospectively, the New Orleans District Attorney's discretion to manage his office's limited

resources and innovate in attorney training will, understandably, be greatly chilled.

CONCLUSION

For these reasons, the NDAA and CDAA urge the Court to retain the heightened burden for municipal liability and reverse the district court.

Respectfully submitted,

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Supreme Court of the United States

HARRY F. CONNICK, DISTRICT ATTORNEY, ET AL.,
Petitioners,

v.

JOHN THOMPSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a municipality can be held liable under section 1983 for a failure to train, where the plaintiff's injury was caused by prosecutors' criminal suppression of evidence and violation of professional ethical standards, absent evidence of a past pattern of similar violations.

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INTEREST OF *AMICI CURIAE*

Amici are national organizations of city and county governments and their members throughout the United States.[1] *Amici* have a strong interest in the development of section 1983 jurisprudence because it affects the manner in which millions of municipal employees, including lawyers and law enforcement officers, carry out their work. Equally important to *amici* is the scope of municipal liability for wrongful and criminal conduct by public employees.

Amici do not dispute that respondent John Thompson suffered grievous harm as a result of criminal acts and other wrongful conduct by prosecutors in the armed-robbery trial that laid the foundation for his conviction for first-degree murder and his capital sentence. Nor do *amici* dispute that he may be entitled to damages under state law. *See Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768-69 & n.15 (2005). The scope of relief available to him under Louisiana law is in the hands of the State's citizens and its judiciary. *See id.* at 768-69; *see also DeShaney* v. *Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 203 (1989).

Amici do, however, oppose altering foundational rules of section 1983 jurisprudence to make a

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

municipality liable in damages for single incidents of wrongful conduct by individual municipal employees. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* v. *Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). That rule is as pertinent to tragic cases as it is to mundane ones.

The judgment of the court of appeals in this case directly contradicts the affirmative act requirement that is the basis for municipal liability under section 1983. Because of the importance of that principle to *amici* and their members, they respectfully submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Section 1983 of Title 42 of the U.S. Code permits liability only for a municipality's own policy choices. It forbids vicarious liability for city employees' unauthorized wrongful acts. Cities can thus be held liable for a failure to train only where that failure reflects deliberate indifference to constitutional rights. Deliberate indifference requires much more than negligence or even gross negligence. It is not enough to show that city policymakers could have or should have known of a danger. Plaintiffs must prove that a city actually knew of a danger and then ignored it.

Professions regulate their members, such as physicians, attorneys, and accountants, by imposing ethical and legal requirements on them. Municipalities must hire and rely on professional employees and are entitled to presume that they will

follow the law and professional standards. Here, prosecutors not only failed to turn over a lab report during Thompson's robbery case, but also destroyed exculpatory blood evidence. By doing so, they committed a crime and violated ethical standards fundamental to the legal profession, including those imposed by *Brady* v. *Maryland*, 373 U.S. 83 (1963). Furthermore, there was no evidence of a history of such conduct.

Thompson was nevertheless permitted to recover on the theory that the District Attorney disregarded a need to train prosecutors to comply with these ethical and legal obligations. The judgment below effectively required district attorneys to presume that their credentialed, screened, and supervised prosecutors will flout the law and the legal profession's ethical standards. By doing so, it contradicted this Court's precedents and allowed vicarious liability without any affirmative municipal act or policy. On the contrary, cities should be entitled to rely on a presumption of legality and professionalism. They should be able to presume that professional employees will obey the law and professional standards until a pattern of conduct demonstrates that presumption is unwarranted.

To show a municipal policy of failing to train employees, plaintiffs must prove a pattern of violations sufficient to make cities aware of the problem. Cities can thus monitor and respond to patterns of violations with training and other programs, or be held liable if they do not. A pattern requirement would be clear, predictable, and allow cities to intelligently deploy their training resources.

In contrast, the courts below allowed liability for a single incident because the need to train was supposedly "obvious," "recurring," and involved "gray areas." These amorphous standards are broad and subjective, so cities cannot predict when they might be blamed in hindsight for failing to train. Liability for a single incident based on an obvious need should be confined to the extreme case of failing to train armed police officers on when they may use deadly force. At the very least, cities should not face liability for failing to train lawyers on their *Brady* obligations. Otherwise, the obviousness test would authorize "one-strike-and-you're-out" liability, emphasizing plaintiffs' injuries rather than municipalities' deliberate policy choices.

ARGUMENT

I. Municipalities Cannot Be Held Liable Under Section 1983 for Omissions Absent Notice of a Need to Act

Under section 1983, a municipality can be held liable only where its own affirmative conduct causes a constitutional injury. Where the conduct is a failure to act, the plaintiff must prove that the municipality knew the action was necessary to avert the injury, but chose not to act. Notice of a need to act is thus essential to any failure-to-act claim, including a failure-to-train claim.

Even as this Court authorized municipal liability under section 1983, it strictly limited its scope. A city may be liable for its *own* conduct, but not vicariously for the conduct *of others*. Liability requires "action pursuant to official municipal policy," not liability

"*solely* because [a city] employs a tortfeasor." *Monell*, 436 U.S. at 691 (emphasis in original). *Monell's* "'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 479 (1986); *see also City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823-24 (1985) (reversing judgment where instructions allowed the jury to impose municipal liability by inferring a policy of inadequate training from a particularly egregious incident).

Thus, municipalities cannot be held liable for mere errors or oversights. Policymakers must be aware of problems and affirmatively choose to disregard them. "[A] showing of simple or even heightened negligence will not suffice" to prove an actionable municipal policy. *Bd. of County Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 407 (1997). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as city 'policy or custom' that is actionable under § 1983." *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989).

In other words, a municipality can be indifferent to the need for a particular action only if it *knows* of the need. It is not enough that the city *could have* known or *should have* known of that need. Thus, the deliberate indifference standard requires clear notice of a need to train. The plaintiff's constitutional injury must be "a known or obvious consequence" or

"highly predictable consequence" of inaction. *Bryan County*, 520 U.S. at 409-10.

The importance of notice is apparent from *Canton*'s hypothetical examples of failure-to-train liability. *Canton* gave two examples of notice: First, a city would be liable if it gave police officers guns without training them in the constitutional limits on when to use deadly force because it must have known that constitutional violations would follow from a failure to train. Second, a city would be liable if its "police . . . so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Canton*, 489 U.S. at 390 n.10. Notice is central to both examples. In the latter, a past pattern of constitutional violations gives notice of the need to train. In the former, notice arises because the city must have recognized the need for training.

Notice is crucial to prevent municipal liability from collapsing into impermissible *respondeat superior* liability. As Justice O'Connor explained, "Without some form of notice to the city, and an opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in relevant part and dissenting in part).

This case does not present the second of the two *Canton* theories of liability. "Thompson does not argue that there was evidence of a pattern." Pet. App. at 72a. "[T]here was not a single instance

involving the failure to disclose a crime lab report or other scientific evidence." Pet. App. at 25a. Indeed, "twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) revealed no pattern of *Brady* violations." *Id.*

Instead, Thompson argued that the city had notice of a need to train regarding *Brady* obligations because the need was inherently obvious.[2] He sought to establish that *Brady* issues recur and involve "gray areas." *See* Joint Appendix ("J.A.") at 171. Thus, he contended, the need to train prosecutors to navigate those situations was inherently obvious.[3] *See* J.A. at 827-28.

As Part II explains, however, Thompson cannot establish notice on this basis. Absent a pattern of violations, the District Attorney need not presume that his employees will violate their ethical and legal obligations as attorneys.

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[2] Thompson asserted, in the alternative, that the *Brady* violations in this case stemmed from an official policy of the District Attorney's office, but the jury rejected that theory. *See* Pet. App. at 39a, 64a.

[3] Of course, Thompson would also have to satisfy *Canton's* heightened causation requirement, which insists that "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Canton*, 489 U.S. at 391. But-for causation is inadequate to establish liability in such cases. *Bryan County*, 520 U.S. at 410 ("To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.").

II. In the Absence of a History of Similar Injuries the District Attorney Cannot Be Held Liable for Thompson's Injury Because It Was Caused by a Criminal Act and the Violation of Professional Standards

When cities hire professionals, they are entitled to rely on them to obey the law and professional ethical obligations. Cities need not presume that professional employees will break the law or breach their ethical duties. To prove notice, therefore, a plaintiff must prove that the municipality knew of a past pattern of violations and failed to correct it. This standard precludes a finding of liability in this case and mandates reversal.

A. A Municipality Is Entitled to Presume That Its Professionals Will Obey the Law and the Ethical Standards of Their Professions

Professions such as medicine, law, and accountancy require members to obey rigorous professional, ethical, and often legal standards. A person or municipality who hires professionals is entitled to presume that they will observe those standards. Indeed, professionals who violate those standards are liable in tort. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 48 (2000).

The Court has repeatedly presumed that prosecutors will observe their professional, ethical, and legal duties. "[P]rosecutors must be assumed to exercise their charging duties properly '[a]bsent facts to the contrary.'" *McCleskey* v. *Kemp*, 481 U.S. 279,

338 (1987) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 225 (1976)); *see also United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Indeed, "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Town of Newton* v. *Rumery*, 480 U.S. 386, 397 (1987).

It is illogical to presume that a municipal employee will violate the standards that govern his profession. As Judge Clement observed in dissent below: "A public employer is entitled to assume that attorneys will abide by the standards of the profession, which include both ethical and practical requirements." Pet. App. at 29a; *see also Pembaur*, 475 U.S. at 486 (White, J., concurring) (observing that acts contrary to local law, even by municipal policymakers, cannot logically be presumed to embody the municipality's policy).

Cities may thus presume that their employees, especially professionals, will behave lawfully and ethically. To overcome this strong presumption, a plaintiff must prove that the breach and injury were "a known or obvious" or "highly predictable consequence" of failing to train on the applicable professional standard. *Bryan County*, 520 U.S. at 409-10. Only a pattern of similar ethical or legal violations by its professional employees will suffice to make this risk known, obvious, or highly predictable.

Here, the prosecutors' actions violated criminal statutes as well as professional standards. As there

had been no pattern of similar violations, there was no notice.

B. Petitioners Could Not Anticipate the Criminal Suppression of Evidence That Occurred

When Thompson was tried for armed robbery in April 1985, Assistant District Attorney Gerry Deegan secretly concealed or destroyed a blood-stained swatch of clothing that would have established Thompson's innocence. J.A. 367; Pet. App. at 58a. Given that fact, the *Brady* violation in Thompson's case largely stemmed, not just from bad judgment, but from a crime.[4]

Louisiana, like many other States and the Federal Government, makes destruction of evidence during armed-robbery and homicide proceedings a felony. *See* La. Rev. Stat. 14:130.1(A) (2009); 18 U.S.C. § 1512(c) (2009).[5] Under Louisiana's current obstruction-of-justice statute, which was in force in 1985, concealing or destroying evidence is at the top of the list of enumerated offenses. *See* La. Rev. Stat. 14:130.1(A)(1). This provision criminalizes precisely the conduct to which Assistant DA Deegan confessed: "Tampering with evidence with the specific intent of distorting the results of any criminal investigation or

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[4] Although Respondent argued that other materials were improperly withheld, his *Brady* claim focused primarily on the pants swatch and related lab report. J.A. at 20.

[5] *See also, e.g.*, Alaska Stat. § 11.56.610(a)(1) (2010); Conn. Code § 53a-155 (2009); 11 Del. Code § 1269 (2009); Idaho Code § 18-2603 (2010); Ohio Rev. Code § 2921.12 (2009); Utah Code § 76-8-510 (2009).

proceeding . . . ." *Id.* §14:130.1(A)(1)(b). Such conduct can occur either at the crime scene or "[a]t the location of storage, transfer, or place of review of any such evidence." *Id.*

Louisiana law recognizes that evidence tampering is particularly harmful in "criminal proceeding[s] in which a sentence of death or life imprisonment may be imposed," allowing for imposition of a prison term of "not more than forty years at hard labor" in such cases. *Id.* §4:130.1(B)(1).

Deegan was deceased by the time the disappearance of the pants swatch came to light in 1999. Had he lived, however, he could have been convicted under Louisiana's obstruction of justice statute. On the first day of trial, he checked out all of the armed robbery evidence from the police property room. But he omitted the pants swatch when he checked the rest of the evidence into the court property room. Pet. App. at 56a. Deegan later confessed to fellow prosecutor Michael Riehlmann "that he had intentionally suppressed [exculpatory] blood evidence in [Thompson's] armed robbery trial." J.A. 367; Pet. App. at 58a. That testimony alone would have sufficed to convict Deegan of a felony.

Deegan's actions were shocking and unforeseeable. As a prosecutor he was obligated – and as the Court has recognized, presumed – to seek only those convictions that were just. Yet, without warning he did the complete opposite and himself committed a felony to secure Thompson's conviction.

It defies common sense to suggest, as the decision below does, that Deegan's actions were a known or obvious consequence of not providing training on the

proper interpretation of *Brady*. Without a history of similar acts, the District Attorney had no reason to expect that criminal suppression of evidence was likely to occur inside his department. And without notice, it cannot be said that the District Attorney's office made a deliberate choice to ignore such a risk.

The Eighth Circuit applied this common sense insight in *Andrews* v. *Fowler*, 98 F.3d 1069 (8th Cir. 1996), a case in some respects similar to Thompson's. In *Andrews*, a police officer raped a young woman while on duty. *Id.* at 1073. The woman subsequently sued the city on the theory that it had provided the officer with inadequate training. *Id.* at 1073-74. The Eighth Circuit rejected the claim due in part to a lack of notice to the city, holding, "we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women." *Id.* at 1077.[6]

Here, as in *Andrews*, a violation of the plaintiff's civil rights was caused not by confusion or poor judgment, but by an employee's intentional crime. To hold the city liable absent a pattern of past similar

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[6] The Eighth Circuit also pointed to the absence of the necessary causal link between the training and the officer's crime. *Andrews*, 98 F.3d at 1077 (Andrews "simply cannot demonstrate the close relationship necessary to conclude that the city's failure to properly train Fowler caused him to rape Andrews or even raises a fact as to causation."); *see also Carr* v. *Castle*, 337 F.3d 1221, 1232 (10th Cir. 2003) ("[Police officers] were not trained by the City to shoot Randall repeatedly in the back after he no longer posed a threat. In sum, even if some inadequacy in training had been shown, Carr cannot demonstrate how it was a direct cause of the Officers' actions and of Randall's consequent death.").

acts requires cities to presume that their employees will intentionally break the law. Yet, as discussed above, cities are entitled to presume just the opposite.

C. The Failure to Turn Over the Lab Report and Blood Evidence Violated Ethical and Professional Rules

The District Attorney had good reason to believe that prosecutors would disclose lab reports and blood evidence even without *Brady*-specific training: because ethical obligations generally applicable to lawyers and those specially applicable to prosecutors required disclosure. Given these obligations, the District Attorney could not have foreseen, let alone known, that failing to offer training on *Brady* would lead prosecutors to withhold evidence in Thompson's case.

1. The Louisiana Rules of Professional Responsibility Required Disclosure

Several provisions of the Louisiana Code of Professional Responsibility obligated the prosecutors to disclose the lab report to Thompson. Disciplinary Rule 7-103(B) of the Louisiana Code of Professional Responsibility (effective July 1970) provided that prosecutors "shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[7]

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[7] The parties stipulated that this rule applied at the time of Thompson's criminal trials. *See* J.A. at 26. The Louisiana Rules

Likewise, Disciplinary Rule 1-102(A)(5) prohibited lawyers from "[e]ngag[ing] in conduct that is prejudicial to the administration of justice."

Here these Rules required prosecutors to produce the lab report and blood evidence to Thompson. The Rules also forbade them to destroy the blood evidence.

2. The ABA Standards for Criminal Justice Required Disclosure

The ABA Standards for Criminal Justice represent a second source of professional obligations for prosecutors. Prosecutors have a duty "to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction." American Bar Association, *ABA Standards for Criminal Justice, Prosecution Function*, Standard 3-1.2(e) (3rd ed. 1993). Prosecutors thus bear a *personal* responsibility, independent of a municipality's obligation to provide training. And, like Disciplinary Rule 7-103(B), the Standards of Criminal Justice identify prosecutors' ethical obligation to comply with *Brady* by disclosing exculpatory material to the defense. *Id.* at Standard 3-3.11(a).

As applied to the conduct at issue here, the Standards for Criminal Justice would have required the prosecutors to be familiar with and obey at least

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of Professional Conduct currently impose substantially similar ethical rules. *See* La. R. Prof'l Conduct 3.8(d), 8.4 (2010).

the Disciplinary Rules and *Brady*. They also would have required prosecutors to disclose the lab report and blood evidence.

Given the independent ethical and professional obligations mandating disclosure, the District Attorney could have reasonably presumed that disclosure would occur. Cities need not presume that their employees might take actions that put their professional careers in jeopardy or that could lead to severe criminal punishments.[8] Indeed, this approach has been rejected in other cases. *See Floyd* v. *Waiters*, 133 F.3d 786, 796 (11th Cir. 1998), *vacated* 525 U.S. 802 (1998), *reinstated* 171 F.3d 1264 (11th Cir. 1999) ("Without notice to the contrary, the [municipality] was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct."); *Andrews*, 98 F.3d at 1077 ("we cannot conclude that there was a patently obvious need for the city to specifically train [police] officers not to rape young women").

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[8] Under the current ABA Standards for Imposing Lawyer Sanctions, upon which Louisiana courts rely (*see In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005)), the intentional misconduct at issue warranted disbarment. *See, e.g.*, American Bar Association, *ABA Standard for Imposing Lawyer Sanctions* 6.11 (1992) ("Disbarment is generally appropriate when a lawyer, with the intent to deceive the court . . . improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.").

D. The Fact That *Brady* Issues Recur and Involve Gray Areas Did Not Put Petitioners on Notice of a Need to Train

To identify a deliberately indifferent refusal to train, Thompson had to show that the District Attorney had notice of a need for *Brady* training. Because the prosecutor's failure to turn over a plainly exculpatory lab report violated multiple ethical and legal standards, there was no such notice here.

Thompson sought to supply notice by drawing an analogy to the obvious need to train armed police officers. Like the use of deadly force against fleeing suspects, Thompson contended, *Brady* compliance was a recurring situation that presented "gray areas." *See* J.A. 171, 827-28; *see also Walker* v. *City of New York*, 974 F.2d 293, 298-99 (2d Cir. 1992). It is doubtful that the recurring "gray area" standard could ever give a municipality enough notice to make a failure obvious. Even if it could provide notice in some cases, it failed to do so here.

A prosecutor "'inevitably makes many decisions that could engender colorable claims of constitutional deprivation.'" *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009) (quoting *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)). Predicating notice on that basis alone would require district attorneys to train on everything.

Here, however, the evidence available to the District Attorney actively dispelled any notion that *Brady* training was needed. Connick had implemented careful systems of case screening, staffing, and supervision. *See* J.A. 425-26; Ronald Wright & Marc Miller, *The Screening/Bargaining*

Tradeoff, 55 Stan. L. Rev. 29, 60-66 (2002). In the *Brady* context, those systems appeared to work: only four convictions obtained by the District Attorney's office were overturned for *Brady* violations in the decade before Thompson's conviction. *See* Pet. App. at 25a. Not a single one of these cases "involve[ed] the failure to disclose a crime lab report or other scientific evidence." *Id.* Thompson, as noted, presented no evidence of a history of similar violations. *See* Pet. App. at 72a, 76a.

"[I]f violations were the 'highly predictable consequence' of a failure to train, then we would expect to see more than just one violation in hundreds or thousands of cases." Pet. App. at 30a. Logically, the plaintiff would have to explain why there is no pattern if they assert that the need is obvious.

Moreover, Thompson had to show more than just notice to prevail. He also had to show a deliberately indifferent refusal to train in the face of notice and that the lack of training was the cause, the "moving force," behind his injury. *See Bryan County*, 520 U.S. at 400. Had Thompson established notice of a need to train with respect to the "gray areas" in *Brady*, his case would have undoubtedly foundered on the causation element. There was no evidence that the prosecutors failed to turn over the lab report because it fell into a *Brady* "gray area" that training might have elucidated. On the contrary, the violation here flowed not from ignorance, but from an intentional act that no training could have prevented.

III. Recognizing a Presumption that Municipal Employees Will Obey the Law and Professional Standards Respects *Monell*

Recognizing that municipalities are entitled to rely on the professionalism of their employees respects *Monell* because it requires notice of a problem before liability can be imposed. By contrast, under the Fifth Circuit's conception of the "obviousness" rule, single incident failure-to-train cases devolve into vicarious liability simply for employing a tortfeasor.

A. The Obviousness Test Threatens to Collapse Municipal Liability into Vicarious Liability

The court of appeals accepted the notion that there can be an obvious need to train employees not to commit crimes or violate professional standards. That reasoning threatens to undermine the important distinction between municipal liability for official policies and vicarious liability for employees' torts and crimes. Like *respondeat superior* liability, it allows a single act by a municipal employee to form the basis for municipal liability. Notice is critical to the distinction between these two approaches. Absent notice to the municipality indicating that training is needed, "the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *See Canton*, 489 U.S. at 395 (O'Connor, J., concurring in relevant part and dissenting in part).

"[A] suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately on the other, would seem very much alike." *Van de Kamp*, 129 S. Ct. at 863. With omission-based liability, there is always a risk that a failure-to-train claim will devolve into a trial over a plaintiff's injury.

B. A Pattern-Based Approach to Municipal Liability Is More Predictable

Making municipal liability more predictable would allow municipalities to intelligently allocate training resources. To cause this desirable end, the Court should decline to apply the obviousness test outside the narrow firearm-training example identified in *Canton*. At a minimum, it should hold that the need for *Brady* training was not obvious here given prosecutors' many ethical and legal obligations. Instead, it should insist on a pattern of violations as a prerequisite for municipal liability.

The key to the pattern test is that it relies on a clear, measurable form of notice. Cities can count, track, and analyze past constitutional violations. They would have incentives to avoid liability by monitoring and addressing violations. These measures would, in turn, help prevent constitutional violations in the first instance. Conversely, if a training program fails to stanch violations, a city will be "on notice that a new program is called for." *Bryan County*, 520 U.S. at 407. The notice provided by a pattern would focus liability on the

municipality's actions or inactions, rather than on the actions of its employees.

A pattern-based test is also simple to apply. Courts need not ponder what is and is not obvious. A pattern of actual past violations, coupled with inaction, would predictably support an inference that a city "deliberate[ly] cho[se] to follow a course of action . . . from among various alternatives," *Pembaur*, 475 U.S. at 483. Conversely, a city that began a training program to address constitutional violations could rest assured that it could not be held liable for an employee's isolated wrongful act.

In stark contrast, expert opinion and similar indirect evidence are unreliable guides to whether a municipality has ignored an "obvious" danger. The obviousness test therefore risks becoming a "one-strike-and-you're-out" approach. As occurred in this case, a court can determine in hindsight that the need for training must have been obvious, leaving municipalities to be held liable without being given any opportunity to implement training that would prevent future violations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,
Petitioners,

v.

JOHN THOMPSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATUTES

42 U.S.C. § 1983.. .. ..*passim*

INTEREST OF *AMICUS CURIAE* [1]

This *Amicus Curiae* Brief is filed in this Honorable Court on behalf of the ninety (as of filing) Assistant District Attorneys who daily represent the interests of the State of Louisiana in the various state and federal courts of Orleans Parish. These ninety *amici* have a profound interest in the continuing viability of the District Attorney's Office as a cornerstone of the maintenance of peace and order in the City of New Orleans. They represent the current generation of prosecutors dedicated to securing justice—zealously, faithfully, and ethically—on behalf of the citizens of the great city of New Orleans, and who receive that torch from the many generations that have taken the same Oath before them.

Amici now stand face-to-face with a $15,000,000 district court judgment against their Office that, as stands, likely threatens their careers as well as the very well-being of the city and people that they serve. Furthermore, they share a firm belief that the judgment in this case was improperly obtained under the controlling law, and, thus, that they are being unjustly deprived by the self-serving and intentional act of a single prosecutor whose actions did not, and do not, represent the prevailing culture of their Office, but rather defy those values Accordingly, as those who would be most immediately affected by an adverse judgment—through staff reductions, seizure

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[1] The parties have consented to the filing of this *amicus curiae* brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief

of Office assets, and harm to their professional reputations—*amici* seek a voice in the decision the consequences of which will reverberate for the rest of their careers.

Amici assert that the accompanying brief is both relevant and desirable to the disposition of this case. Significant issues exist regarding § 1983 municipal liability under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 685 (1978), and its progeny. Specifically, *amici* seek to address the propriety of holding a municipal employer liable for a single constitutional violation where there is no pattern or practice of such violations and, most importantly, where the actions and words of the actor employee reasonably demonstrate that he acted in full awareness of both his duty and the violative nature of his conduct, such that the municipality cannot be held to have been "deliberately indifferent" to the need to train under this Honorable Court's established and stringent standards of liability.

SUMMARY OF THE ARGUMENT

In writing on behalf of six judges of the Fifth Circuit Court of Appeals in favor of reversal of the judgment, Judge Edith Brown Clement found it "imperative" to counsel that the result in the instant case risked encouraging the extension of single incident municipal liability beyond the "most limited circumstances" under which the law of this Court has unequivocally held that it may be found.[2]

The danger posed by the Fifth Circuit's divided affirmance of the verdict in favor of Thompson is

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[2] *See Thompson* v *Connick*, 578 F.3d 293, 295-6 (5th Cir. 2009)

precisely the progressive unraveling of the tightly-woven standards for finding such liability based on a single incidence of a failure to train municipal employees. *Monnell* and *City of Canton* establish an exceedingly high bar for plaintiffs seeking to hold a municipality liable for the wrongs of its employees in such cases, the stringency of which has been emphasized repeatedly by this Court: municipalities may not be held liable on a *respondeat superior* theory; the need for training must be *obvious*; the municipality must be *deliberately* indifferent to the need to train; the failure to train must be the *driving force* behind the constitutional violation.

The continued affirmance of the current *status quo* threatens to defang the strict standards above, and further blur the line between *Monell/City of Canton* liability and *respondeat superior* in factual scenarios, like the one here, where the very nature of a municipal employee's bad act reasonably demonstrates that: *no* amount of training could have prevented the constitutional violation; the need for training could *not* have been sufficiently obvious, and; no failure to train could have been the *driving force* behind the constitutional violation.

To hold municipalities liable in such situations works a grave and undeserved wrong and punishes them for acts of their employees that could not possibly have been prevented. Thus, the continued judicial approval of findings of liability on facts such as exist in the instant case—scenarios which confront not just prosecutor's offices, but sheriff's offices and police departments nationwide on a daily basis—will have a severe and negative impact on the criminal justice system as a whole.

As such, this Court should consider the issues presented herein in support of reversing the rulings of the courts below.

ARGUMENT

I. IT IS FUNDAMENTALLY UNFAIR, AS WELL AS DISCORDANT WITH THE PURPOSES OF § 1983 LIABILITY, TO HOLD A MUNICIPAL EMPLOYER LIABLE FOR THE INTENTIONAL AND UNCONSTITUTIONAL ACTS OF ITS EMPLOYEES UNDER CIRCUMSTANCES THAT REASONABLY DEMONSTRATE THAT THE EMPLOYEE WAS AWARE OF THE UNCONSTITUTIONAL NATURE OF HIS ACTS AND THAT THE EMPLOYER DID NOT HAVE THE WHEREWITHAL TO PREVENT THOSE ACTS IN THE FIRST PLACE.

This Court established in *Monell v Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), that a municipality cannot be held liable under § 1983 for the unconstitutional acts of its employees based merely on its status as their employer. Furthermore, the *Monell* court established that some municipal policy or custom must in fact be the "moving force" behind the constitutional violation. 436 U.S. at 694; 98 S.Ct. at 2038. That is, "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985)

In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), this Court acknowledged that *Monell* liability could be based on a single incidence of a constitutional violation caused by a municipality's

failure to train its employees where the potential for constitutional violation due to lack of training is so obvious that the municipality can be said to have been deliberately indifferent to the need to train. 489 U.S. at 390, n.10, 109 S. Ct. at 1205, no. 10. The *Harris* Court appropriately established an exacting standard for finding liability under a failure to train theory where there is no pattern of previous constitutional violations, which has been repeatedly reaffirmed by the federal courts. *See Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 385-86 (5th Cir. 2005); *Pineda v. City of Houston*, 291 F.3d 325, 334-35 (5th Cir. 2002); *Burge v. St. Tammany Parish*, 187 F.3d 452, 471-72 (5th Cir 1999); *Snyder v Trepagnier*, 142 F.3d 792, 798-99 (5th Cir. 1998); *Bd. of the County Comm'rs v Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388, 137 L. Ed. 2D 626 (1997) In fact, in only one case before the subject of the the instant petition has the Fifth Circuit upheld a finding of liability based on a single incident. See *Brown v. Bryant County*, 219 F.3d 450 (5th Cir. 2000).

Accordingly, there exists a well-established analytical framework for analyzing municipal failure to train claims based on a single constitutional violation: How obvious should the need to adequately train an employee have been to the municipality? Was the ensuing constitutional violation a highly predictable consequence of not training that employee? Was the failure to train the moving force that had a specific causal connection to the constitutional injury? In other words, does the evidence establish, under the "stringent standards" of this Court, "unmistakable culpability and clearly connected causation"? *Brown*, at 461 (citing *Board of County Com'rs of*

Bryan County. v. Brown, 520 U.S. 397, 117 S.Ct. 1382 (1997)).

This Court has already provided some guidance on this question. In *City of Canton*—the case in which the single-incident exception was first recognized—Justice O'Connor, concurring in part and dissenting in part, observed that "[t]he central vice of [§ 1983], as noted by the Court's opinion in *Monell*, was that it 'impose[d] a species of vicarious liability on municipalities since it could be construed to impose liability even if the municipality *did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it.*'" 489 U.S. at 395, 109 S.Ct. at 1208 (quoting *Monell*, 436 U.S., at 692, n. 57, 98 S.Ct., at 2036, n. 57) (emphasis added)).

Justice O'Connor's expressed concern regarding a municipality's inability to control the acts of an employee whose actions and words reasonably demonstrate that he *intentionally* violated a citizen's constitutional rights is especially significant in light of this Court's reasoning that "[section] 1983 was intended not only to provide compensation to the victim's of past abuses, *but to serve as a deterrent against future constitutional deprivations* as well." See *Robertson v. Wegmann*, 436 U.S. 584, 590-91, 98 S.Ct 1991, 1995 (1978) (emphasis added).

Most recently, in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009), Justice Breyer, writing for a unanimous Court, further emphasized this Court's concerns over the potential negative systemic consequences of a municipal employee's intentional bad act. Although dealing directly with the issue of an individual supervisor's failure to train and monitor, the Court highlighted the office-wide "practical ano-

malies," see *Van de Kamp*, at 863, that allowing liability to attach in such situations could engender.

> A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office-wide supervision and training, would not. Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler* [v. *Pachman*,424 U.S. 409 (1976)].
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> *Id.* (emphasis in original).

This Court has thus recognized that the value of § 1983's deterrent effect on a municipality in situations in which it has no ability to deter the unconstitutional actions of a particular employee questionable at best. In fact, common sense informs that the threat of a § 1983 law suit would have *zero* deterrent effect in such a situation. Liability under *Monell* and *City of Canton* seeks to punish and deter bad training by a municipal employer. They are of no avail against the bad *character* of an individual municipal employee, especially one who—as here—acknowledged the illicit nature of his acts and demonstrated that no amount of training could have stopped him from doing them. Given that scenario, a municipal employer simply cannot be held liable under the exceeding standards set out by this Court in *Monnell* and *City of Canton*.

As stated *supra*, the facts of the instant case—by this point well known—illustrate a scenario in which § 1983 liability would not provide any deterrence from future violations and where Harry Connick simply did not have the wherewithal to prevent the instant one, through training or otherwise.

John Thompson was charged first with the murder of Raymond Liuzza and subsequently with the armed robbery of Nathan Lagarde and his siblings. Prosecutors elected to try Thompson for the robbery first, knowing that a conviction on that charge could (1) prevent Thompson from testifying in his defense at the murder trial, and (2) be used as an aggravating factor in securing a death sentence following conviction for the murder.[3] It was in the armed robbery trial that the exculpatory blood evidence and lab report were intentionally suppressed.

Two days before Thompson's armed robbery trial began, the NOPD crime lab sent a report to Bruce Whittaker, the screening attorney, indicating that the perpetrator's blood, as determined from a sample he had left on Jay Lagarde's pant leg, was type 'B'[4] Whittaker stated that he placed the report on James Williams' desk—as Williams was the lead prosecutor in the armed robbery case—but Williams claimed never to have seen it.[5] On the morning of the first day of Thompson's armed robbery trial, Jerry Deegan checked the evidence—including the bloody swatch of pants leg—out of the NOPD evidence room; he then checked the evidence into the courthouse property

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[3] *Thompson v Connick*, 553 F 3d 836, 843 (5th Cir 2008).

[4] *Id.* at 844.

[5] *Id*

room—with the glaring exception of the bloody swatch.[6]

At trial, Williams never mentioned any blood evidence and relied entirely on witness testimony in securing a conviction for attempted armed robbery against Thompson.[7] Due to this conviction, Thompson elected not to testify at his murder trial, and he was found guilty by the jury. During the penalty phase, Williams elicited testimony from the Lagardes about Thompson's attempt to rob them and Williams emphasized that fact in his closing argument as proof that Thompson merited the death penalty.[8] The jury sentenced Thompson to die.[9]

Nine years after Thompson's conviction, but before the exculpatory lab report was discovered, Deegan confessed to former fellow assistant district attorney Mike Riehlmann that he had intentionally withheld the exculpatory blood evidence in Thompson's armed robbery trial.[10] Upon the discovery of the missing lab report 1999, Riehlmann reported Deegan's confession and District Attorney Connick moved to vacate the armed robbery conviction and stay Thompson's execution.[11]

The facts also reflect that Deegan, Williams, and all other assistants in Connick's office received instruction on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), in law school, prior to their employment; that

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[6] *Id*

[7] *Id*

[8] *Id* at 844-45

[9] *Id*. at 845

[10] *Id*

[11] *Id*

office policy at the time of Deegan's withholding of the blood evidence dictated that all lab reports be turned over to the defendant; and that there had only been four confirmed *Brady* violations out of Connick's office in the ten years preceding Thompson's trial.[12]

Gerry Deegan's inherently suspicious actions—returning all but the exculpatory blood evidence to the property room after Thompson's armed robbery trial; maintaining that secret for another decade; revealing on his death bed that he *intentionally* withheld the exculpatory evidence—may reasonably demonstrate that he knew what his obligation under *Brady* was and that he was violating it. As such, and coupled with the severe dearth of previous *Brady* violations out of his office, it may be reasonably argued that Connick had no reason to suspect that additional *Brady* training was required. Williams' decision not to use the blood evidence that was available to him may also reasonably demonstrate that he was aware of its exculpatory nature as well. Finally, Connick's post-disclosure move to vacate Thompson's robbery conviction reasonably demonstrates that he was taken off guard by the above acts of intentional deception.

Thus, this Court should logically conclude that, under such factual circumstances, it simply does not comport with fundamental ideas of fairness to hold a municipality liable for intentional and knowing acts of employees that in themselves reasonably demonstrate that an employer "did not know of an impend-

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[12] *See generally, Thompson v Connick*, 578 F.3d at 303-306 This total represents approximately one four hundredth of one percent of all cases prosecuted by the Orleans Parish District Attorney's Office in that period

ing or ensuing [act] or did not have the wherewithal to do anything about it." In short, this Court should voice its intent to maintain § 1983 as vehicle for punishing and deterring bad *training* on the part of municipal employers, while refusing to allow them to be unfairly burdened by the fruits of their employees' bad *character*.

CONCLUSION

For these reasons, the Orleans Parish Assistant District Attorneys respectfully urge the Court to reverse the rulings of the courts below.

Respectfully submitted,

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